

In The
Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350

RAYMOND H. WARNS, JR.
Counsel of Record
ROBERT J. BURKE, JR.
HOLMES WEDDLE & BARCOTT
999 Third Ave., Suite 2600
Seattle, WA 98104
(206) 292-8008

Counsel for Petitioners

QUESTIONS PRESENTED

1. Section 10(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 910(a), applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury," but Congress did not define "substantially." In deciding whether section 10(a) applies in a particular case, should an administrative law judge (ALJ) be required as a matter of law to follow a judicially created "bright-line 75% rule" or should the ALJ have the flexibility to decide each case on its particular facts?

2. Is an injured employee entitled to total disability benefits under the LHWCA during a period of vocational retraining when the employee would otherwise be limited to recovery under the schedule in section 8(c), 33 U.S.C. § 908(c)?

**LIST OF PARTIES AND
RULE 29.6 STATEMENT**

All parties to the proceeding are listed in the caption of the case.

Petitioner General Construction Company's parent corporation is Kiewit Construction Group Inc., which has as its parent corporation Peter Kiewit Sons', Inc. Neither Kiewit Construction Group Inc. nor Peter Kiewit Sons', Inc. is a publicly traded company. No publicly held company owns 10 percent or more of the stock of General Construction Company.

Petitioner Liberty Northwest Insurance Corporation's parent corporation is Liberty Mutual Insurance Corporation. No publicly held company owns 10 percent or more of the stock of Liberty Northwest Insurance Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT ...	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	2
Statutory Background	4
Factual Background	6
The Decisions Below	8
REASONS FOR GRANTING THE PETITION	9
I. The Ninth Circuit's "bright-line 75% rule" is in acknowledged conflict with the rule ap- plied by the Seventh Circuit and is inconsis- tent with the rule in other circuits	9
II. Awarding total disability benefits during a period of vocational retraining when the in- jured employee would otherwise be limited to recovery under the Act's schedule is inconsis- tent with the plain language of the Act and this Court's decision in <i>Potomac Electric</i> <i>Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	13
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
CASES	
<i>Baltimore & O.R. Co. v. Clark</i> , 59 F.2d 595 (4th Cir. 1932)	12
<i>Gulf Best Elec., Inc. v. Methe</i> , 396 F.3d 601 (5th Cir. 2004)	12
<i>Louisiana Ins. Guar. Ass'n v. Abbott</i> , 40 F.3d 122 (5th Cir. 1994).....	8, 9, 17
<i>Matulic v. Director, OWCP</i> , 154 F.3d 1052 (9th Cir. 1998)	<i>passim</i>
<i>Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP</i> , 315 F.3d 286 (4th Cir. 2002).....	17
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	<i>passim</i>
<i>Stevedoring Servs. of Am. v. Price</i> , 382 F.3d 878 (9th Cir. 2004).....	9, 11
<i>Strand v. Hansen Seaway Service</i> , 614 F.2d 572 (7th Cir. 1980).....	10, 11
STATUTES AND RULES	
28 U.S.C. § 1254(1).....	1
Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50	2
LHWCA § 2(10), § 33 U.S.C. § 902(10).....	4, 16
LHWCA § 8, 33 U.S.C. § 908.....	13
LHWCA § 8(a), 33 U.S.C. § 908(a)	4, 13

TABLE OF AUTHORITIES - Continued

	Page
LHWCA § 8(b), 33 U.S.C. § 908(b)	4, 13
LHWCA § 8(c), 33 U.S.C. § 908(c)	i, 3, 4, 13
LHWCA § 8(c)(1)-(20), 33 U.S.C. § 908(c)(1)-(20).....	2, 14
LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2)	5, 6, 14, 15
LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21)...	2, 4, 5, 14, 16
LHWCA § 8(e), 33 U.S.C. § 908(e).....	4, 13
LHWCA § 8(h), 33 U.S.C. § 908(h).....	2, 5
LHWCA § 10(a), 33 U.S.C. § 910(a)	<i>passim</i>
LHWCA § 10(b), 33 U.S.C. § 910(b)	5
LHWCA § 10(c), 33 U.S.C. § 910(c)	2, 3, 5, 10, 12
20 C.F.R. § 701.301(7)	2



PETITION FOR WRIT OF CERTIORARI

General Construction Company and Liberty Northwest Insurance Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 401 F.3d 963 (9th Cir. 2005) and reprinted in the Appendix to this Petition ("App.") at 1. The unreported order of the court of appeals denying petitioners' petition for rehearing en banc is reprinted at App. 89.

The decision of the Benefits Review Board is reported at 37 Ben. Rev. Bd. Serv. 65 (2003) and reprinted at App. 32.

The decision of the Administrative Law Judge ("ALJ") is reported at 36 Ben. Rev. Bd. Serv. 407 (ALJ) (2002) and reprinted at App. 63.

JURISDICTION

The Ninth Circuit entered judgment on March 2, 2005 (App. 1) and denied a timely petition rehearing on May 20, 2005 (App. 89). On July 21, 2005, Justice O'Connor granted an extension of time to submit a petition for certiorari until September 17, 2005. Docket No. 05A70. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 8(c)(1)-(20) of the LHWCA, 33 U.S.C. § 908(c)(1)-(20), is reprinted at App. 91-93.

Section 8(c)(21) of the LHWCA, 33 U.S.C. § 908(c)(21), is reprinted at App. 94.

Section 8(h) of the LHWCA, 33 U.S.C. § 908(h) is reprinted at App. 95.

Section 10(a) of the LHWCA, 33 U.S.C. § 910(a), is reprinted at App. 96.

Section 10(c) of the LHWCA, 33 U.S.C. § 910(c), is reprinted at App. 96.

20 C.F.R. § 701.301(7) is reprinted at App. 97.

STATEMENT OF THE CASE

This case presents two important questions of federal law concerning the benefits that an injured employee may recover under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"), 33 U.S.C. §§ 901-50. First, the Ninth Circuit, in acknowledged conflict with another court of appeals, has invented a self-described "bright-line 75% rule," App. 27, to determine whether an injured employee worked "during substantially the whole of the year immediately preceding his injury" in order to trigger the application of LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96). More specifically, the Ninth Circuit has declared that any injured employee who worked more than 75% of the available work days during the preceding year is entitled, as a matter of law, to the benefit of section

10(a). This results in admitted over-compensation in virtually every case, including almost 30% over-compensation in this case.

Second, the Ninth Circuit has attempted to evade this Court's decision in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980), by holding that a worker with a scheduled permanent partial disability is nevertheless entitled to compensation beyond the scheduled amount because the worker is engaged in vocational retraining. Although the *PEPCO* Court held that a worker with a scheduled permanent partial disability is entitled to recover only the amount Congress authorized in LHWCA § 8(c), 33 U.S.C. § 908(c) (App. 91-93), the court of appeals held that such a worker engaged in vocational retraining should be characterized as having a permanent total disability – despite his admitted ability to return to work – in order to qualify for more generous compensation.

The LHWCA represents a statutory compromise under which injured maritime workers obtain prompt and certain compensation from their employers without proof of fault. Employers, in turn, are protected from the higher damage awards that might be available in a common-law tort action. See, e.g., *PEPCO*, 449 U.S. at 281. By creating two rules admittedly designed to provide workers with higher compensation, the Ninth Circuit has undermined the careful compromise that Congress enacted. This Court should grant review to resolve the conflict among the circuits, restore the balance that Congress intended, and protect the legitimate interests of both workers and employers.

Statutory Background

Under the LHWCA, "disability" is an economic concept based upon a medical foundation. The Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." LHWCA § 2(10), 33 U.S.C. § 902(10). In considering the type of benefits that an injured employee receives, the Act recognizes four classifications of disability in which "temporary" and "permanent" concern the length and nature of the disability while "total" and "partial" concern the degree of disability:

- Temporary Total: an injured employee is unable to perform any gainful employment, but is expected to recover and return to full employment;
- Temporary Partial: an injured employee has a partial loss of earning power, but is expected to recover and return to full employment;
- Permanent Total: an injured employee is unable to perform any gainful employment and has reached full medical recovery;
- Permanent Partial: an injured employee has reached full medical recovery, but retains some residual wage-earning capacity.

LHWCA § 8(a)-(c), (e), 33 U.S.C. §§ 908(a)-(c), (e). *See also infra* at 13.

For certain specified injuries (known as "scheduled injuries"), the Act provides a schedule to calculate the compensation payable to an injured employee for a permanent partial disability. The loss of a leg, for example,

entitles a worker to 288 weeks' compensation (calculated as two-thirds of the worker's average weekly wages). See LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2) (App. 91). For a partial loss of use of a leg, the injured worker may recover a proportionate share of this amount. Thus for a 17% leg disability, as in the present case, the worker may claim a 48.96-week award.¹

For a permanent partial disability not falling under the schedule, such as a spinal injury, the Act provides a formula for calculating benefits. See LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21) (App. 94). The compensation for non-scheduled injuries consists of weekly payments based on the employee's loss of wage-earning capacity for as long as the loss continues. See also *infra* at 14. Several factors are considered in computing the loss of wage-earning capacity. See LHWCA § 8(h), 33 U.S.C. § 908(h) (App. 95).

The baseline for establishing the amount or rate of disability compensation, whether temporary or permanent, total or partial, is the employee's pre-injury "average weekly wage." Section 10 of the Act provides three alternative methods for calculating a claimant's earning capacity. LHWCA § 10(a)-(c), 33 U.S.C. § 910(a)-(c). Under paragraph (a), which applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury," the employee's "average daily wage or salary" on days actually worked is essentially multiplied by the number of work days in a week to yield an "average weekly wage." For an employee who typically works every day, of course, the section 10(a) "average weekly wage" is equivalent to actual earnings. If an

¹ 17% of 288 weeks = 48.96 weeks

employee regularly worked only four days out of every five, however, the methodology of section 10(a) – if it were used – would inflate the employee's "average weekly wage" to a figure 25% above the actual earnings.²

Factual Background

Robert Castro claimed LHWCA compensation from petitioner General Construction Company and its insurance carrier, petitioner Liberty Northwest Insurance Company, for a November 20, 1998, right knee injury. Mr. Castro was ultimately awarded a 17% permanent partial disability rating of his right leg pursuant to LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2) (App. 91). During the 52 weeks immediately preceding his injury, Mr. Castro worked a total of 201.35 days (App. 6-7, 59, 76-77), i.e., 77.4% of the available work days,³ and earned a total of \$40,466 (App. 59, 77), i.e., an average of \$778.19 per week.⁴

Beginning in September 1999, petitioners retained vocational rehabilitation consultants to conduct labor market surveys to determine whether suitable alternative employment was available to Mr. Castro. In one labor market survey, a consultant identified thirteen jobs that were available. Another vocational consultant performed additional labor market surveys and found another ten

² To take a simple example, if an employee always worked four days per week and earned \$200 each work day, section 10(a) would define the "average weekly wage" to be \$1,000, which is 25% higher than the employee's actual earnings of \$800 per week. For a more extreme example, see *infra* note 5.

³ $201.35 \div 260 = 77.4\%$

⁴ $\$40,466 \div 52 = \778.19

jobs that Mr. Castro could perform. The Administrative Law Judge ("ALJ") concluded that petitioners had shown—suitable alternative employment through the identification of these 23 jobs and that Mr. Castro accordingly retained wage-earning capacity. App. 81. This factual finding was upheld by both the Benefits Review Board, App. 35, and the court of appeals, App. 7.

Almost a year after Mr. Castro's knee injury had reached a permanent state, the Department of Labor determined that Mr. Castro was a candidate for vocational retraining. The Department retained a vocational consultant who devised a plan, predicted to take two years, for Mr. Castro to be retrained in hotel/motel management at a local community college. The vocational consultant testified at a formal hearing that the internship program provided the opportunity to gain actual work experience to bridge the gap between study and work. Mr. Castro testified that as part of the vocational program, he was required to work 700 hours and, in fact, had obtained a paid internship with Marriott Hotels during the year prior to the formal hearing. He further testified that he had already worked over 80 hours at this job and was paid approximately \$7.75 per hour.

Despite having an injury falling under the Act's schedule, despite being found employable by two consultants, and despite being required to work during the government-sponsored vocational rehabilitation, Mr. Castro sought total disability compensation during his rehabilitation program. Furthermore, Mr. Castro sought disability compensation based upon a calculation of his average weekly wage under LHWCA § 10(a), 33 U.S.C. § 910(a)

(App. 96), that was nearly 30% higher than his actual earnings.⁶

The Decisions Below

The ALJ found that Mr. Castro was entitled to total disability benefits during the period of his vocational retraining despite suffering from a scheduled injury and despite petitioners' showing of suitable alternative employment. Extending the Fifth Circuit's decision in *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994), to the context of a scheduled injury, the ALJ held that an employee who is otherwise employable is entitled to ongoing total disability benefits during the pendency of a government-sponsored vocational rehabilitation plan.

The ALJ also followed the Ninth Circuit's decision in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), which had announced the bright-line rule that LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96), applies "when a claimant works more than 75% of the workdays of the measuring year," 154 F.3d at 1058. This application of section 10(a) made Mr. Castro's statutory "average weekly wage" almost 30% higher than his actual earnings. See *supra* note 5.

The Benefits Review Board, following *Abbott* and *Matulic*, affirmed. App. 32.

⁶ Mr. Castro's actual earnings averaged \$778.19 per week. See *supra* note 4 and accompanying text. Under the ALJ's application of section 10(a), Mr. Castro's average daily wage of \$200.87 ($\$40,466 \div 201.35$; see *supra* notes 3-4 and accompanying text) produced a statutory - but entirely hypothetical - "average weekly wage" of \$1004.37. App. 87. This represents a 29.1% increase over his actual earnings.

Petitioners appealed the Board's decision to the Ninth Circuit, which affirmed on both issues, App. 1, and denied a petition for rehearing, App. 89. The court of appeals agreed that *Abbott* should be extended to the present context despite the fact that Mr. Castro had suffered a scheduled injury. It sought to avoid the application of this Court's *PEPCO* decision by characterizing workers with scheduled permanent partial disabilities as "totally disabled" while engaged in vocational retraining (App. 12, 19-20), even though the court of appeals also accepted the ALJ's finding that Mr. Castro could return to work (App. 7), and thus could not have been totally disabled.

The Ninth Circuit also agreed that its prior decision in *Matulic*, along with its more recent decision in *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 884-85 (9th Cir. 2004), required the application of LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96), because Mr. Castro had worked 77.4% of the available work days. App. 20-27. Although the court of appeals recognized "the virtual inevitability of overcompensation under § 10(a)," App. 24, this result was justified by its express desire to favor workers, App. 22-24.

REASONS FOR GRANTING THE PETITION

- I. The Ninth Circuit's "bright-line 75% rule" is in acknowledged conflict with the rule applied by the Seventh Circuit and is inconsistent with the rule in other circuits

When Congress enacted the LHWCA, it provided three alternatives in section 10 for calculating an employee's pre-injury earning capacity. Section 10(a), 33 U.S.C. § 910(a) (App. 96), applies only if an injured employee worked "during substantially the whole of the year

immediately preceding his injury." But Congress made no attempt to provide any bright-line rule specifying more precisely when section 10(a) applies (although it would undoubtedly have been a simple matter to do so). Indeed, Congress did not define "substantially" even in general terms. The clear implication was that the ALJ should have the flexibility to decide each case on its particular facts. This is confirmed by the terms of section 10(c), 33 U.S.C. § 910(c) (App. 96), which applies "[i]f [the method of section 10(a)] cannot *reasonably* and *fairly* be applied." (Emphasis added.) Both in describing when section 10(a) applies and in describing when it does not, Congress chose broad language giving ALJs wide flexibility. Nothing could be further from Congress's approach (focusing as it does on "reasonabl[eness] and fair[ness]") than a bright-line rule requiring ALJs, as a matter of law, to apply section 10(a) in precisely defined circumstances without regard to whether it is reasonable or fair.

Notwithstanding the clear statutory language, the Ninth Circuit has firmly established what it describes as a "bright-line 75% rule." App. 27. A divided panel of the court first announced the rule seven years ago in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998). Writing for the majority, Judge Reinhardt declared:

[W]e conclude that when a claimant works more than 75% of the workdays of the measuring year the presumption that [section 10(a)] applies is not rebutted.

154 F.3d at 1058. In reaching this conclusion, the majority acknowledged that the Seventh Circuit applied a different rule and would have reached a different result. *See id.* at 1058 n.4 (citing *Strand v. Hansen Seaway Service*, 614 F.2d 572 (7th Cir. 1980)). But Judge Reinhardt tolerated

this conflict because "some 'overcompensation' is built into the system," *id.* at 1057, and the result was "supported by the humanitarian purposes of the LHWCA and by our mandate to construe broadly its provisions so as to favor claimants in the resolution of benefits cases," *id.*

Judge Reed argued in dissent that the majority's bright-line rule was "neither reasonable nor fair." *Id.* at 1061. First, it resulted in excess compensation when compared to the worker's actual employment record. In *Matulic*, the claimant had worked only 82% of the available work days but he was compensated as if he had worked them all. *See id.* Second, "the majority has consciously created an inter-Circuit conflict." *Id.* (citing *Strand*, 614 F.2d at 574). And third, section 10(a) did not accurately reflect the claimant's earning capacity because he had voluntarily failed to work the full year.

Two more recent decisions demonstrate that *Matulic*'s bright-line 75% rule is now firmly established in the Ninth Circuit. In *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878 (9th Cir. 2004), the court noted that the claimant had "worked 75.77 percent of the measuring year." He therefore fell "near the line that *Matulic* drew but clearly within it." *Id.* at 884. And in the decision below, the panel similarly applied *Matulic* as established authority. *See App.* 23-26. In the process, the court once again acknowledged the conflict with the Seventh Circuit's decision in *Strand* and once again disagreed with its reasoning. *See App.* 25.

In deciding *Matulic* (and again in the decision below), the Ninth Circuit acknowledged its conflict with *Strand* and expressly rejected the Seventh Circuit's approach. The *Strand* court had held that a claimant who had worked

only 84% of the possible days in the preceding year could not benefit from section 10(a) but was instead subject to section 10(c).

The Ninth Circuit's bright-line 75% rule is also inconsistent with the approach taken in at least two other circuits. Less than a year ago, the Fifth Circuit expressly declined to follow *Matulic*. See *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 606 (5th Cir. 2004) ("this court has not adopted such a bright-line test for the applicability of [section 10(a)]"). And the Fourth Circuit long ago rejected the approach that *Matulic* would later take. In *Baltimore & O.R. Co. v. Clark*, 59 F.2d 595, 599 (4th Cir. 1932); the court explained that section 10(a) applies "only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by [the number of work days in the year] would approximate the average annual earnings." Moreover, the court particularly warned against using a method that "would give as annual earnings a sum far in excess of the actual earning power of the employee." *Id.*

By departing from the Congressional scheme, which gave the ALJs the flexibility to decide each case on its own merits, and imposing a bright-line rule in a context in which no such rule is authorized,⁶ the Ninth Circuit has substituted its judgment for Congress's and has imposed

⁶ The Ninth Circuit complained that petitioners' arguments below "would appear to attack not only the line drawn in *Matulic* but also the drawing of a line at all." App. 24. This complaint both captures the fundamental nature of the Ninth Circuit's error and demonstrates that the panel entirely failed to appreciate it. When Congress has enacted a general standard giving ALJs the flexibility to decide each case on its particular facts, it is indeed a mistake to impose *any* bright-line rule that applies as a matter of law in every case.

burdens on employers that go far beyond what had been intended.

This departure has thrown confusion into a system where federal uniformity is of the utmost importance. Longshore employers and their respective carriers now face having to pay different benefits in different parts of the country. If there is to be such a bright-line test, it should properly come from Congress. If it is to be judicially created, this Court should be the one to announce it – thus ensuring the uniform application of the LHWCA.

II. Awarding total disability benefits during a period of vocational retraining when the injured employee would otherwise be limited to recovery under the Act's schedule is inconsistent with the plain language of the Act and this Court's decision in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980)

The plain language of LHWCA § 8, 33 U.S.C. § 908, distinguishes among four classifications of disability. See also *supra* at 4. Moreover, the appropriate compensation authorized for each classification is specifically defined. Section 8(a), for example, defines the compensation payable for permanent total disability, section 8(b) defines the compensation payable for temporary total disability, and section 8(e) defines the compensation payable for temporary partial disability. In all three cases, the compensation is calculated under a formula tied to the injured worker's lost wage-earning capacity.

Section 8(c), in contrast, defines the compensation payable for permanent partial disability in two ways. For the so-called "scheduled injuries," see *supra* at 4, section

8(c)(1)-(20) (App. 91-93) specifies a certain level of compensation – based on the injured worker’s “average weekly wages” – for each type of injury. These awards do not depend on any actual decrease in the worker’s earning capacity. Congress simply made the decision that a particular type of injury justified a particular level of compensation that might be higher or lower than the actual loss of wages in a particular case. For a permanent partial disability not falling under the schedule, on the other hand, section 8(c)(21) (App. 94) provides a formula that permits the injured worker to recover two-thirds of the lost wage-earning capacity.

The LHWCA’s unique treatment of scheduled injuries creates an incentive for injured workers to attempt to recover compensation outside of the schedule whenever the schedule would limit their recovery to less than two-thirds of their lost wage-earning capacity. This Court addressed precisely such a case in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980). The *PEPCO* claimant, much like Mr. Castro, suffered a permanent partial loss of the use of a leg, which is a scheduled injury covered by LHWCA § 8(c)(2) (App. 93). Dissatisfied with the compensation authorized under section 8(c)(2), he sought compensation under section 8(c)(21) (App. 94) based on his lost wage-earning capacity. This Court resoundingly rejected that attempt in terms that are particularly relevant here.

PEPCO is relevant primarily for its holding that the benefits payable under section 8(c)(1)-(20) (App. 91-93) are exclusive for those who suffer permanent partial disability by reason of scheduled injuries. That holding should have been dispositive here. Mr. Castro clearly suffered a scheduled injury: a permanent partial loss of the use of a leg,

which is covered by LHWCA § 8(c)(2) (App. 91). This injury undeniably resulted in a permanent partial disability. The disability was found to be "permanent," see App. 91, and that finding has not been challenged. The disability is "partial" because Mr. Castro retains the ability to earn wages – a fact found by the ALJ, App. 81, and confirmed by the Benefits Review Board, App. 35, and the court of appeals, App. 7. See also *supra* at 6-7. Just as the *PEPCO* claimant was not allowed to avoid the schedule by relying on section 8(c)(21) (App. 94), so Mr. Castro should not be allowed to avoid the schedule by claiming a total disability (a claim that is in any event inconsistent with the finding that he retains the ability to earn wages).

PEPCO is also relevant for its analysis of the claimant's argument. The court of appeals in *PEPCO*, like the Ninth Circuit here, had relied heavily on the LHWCA's humanitarian objectives to justify awarding higher benefits to an injured worker. See 449 U.S. at 273; cf. App. 24. This Court responded:

The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. . . . It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered

disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of the disabled laborers and their employers. The use of the schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.

449 U.S. at 281-82 (footnotes omitted). The Court concluded: "sympathy is an insufficient basis for approving a recovery that Congress has not authorized." *Id.* at 284.

The Ninth Circuit, seeking to avoid *PEPCO*, purported to distinguish that case on the ground that it addressed only "permanent *partial* disability benefits" while Mr. Castro was entitled to "benefits for *total* disability" because of his vocational retraining. App. 12 (emphasis in original). But that is a conclusory assertion unfounded on the facts. All three of the decisions below recognize that Mr. Castro retains the ability to work. See App. 7, 35, 81. He has no "incapacity because of injury to earn . . . wages." LHWCA § 2(10), 33 U.S.C. § 902(10) (defining "disability"). Any incapacity to earn wages is not "because of injury" but because of his desire to engage in vocational retraining. This case therefore has little to do with total disability except to the extent that the Ninth Circuit chose to declare a rule whereby an employee with a permanent partial disability in fact is treated as having a total disability during vocational retraining. But there is no more justification for avoiding the limits of the schedule by this device than there was to avoid those limits in *PEPCO* through section 8(c)(21) (App. 94).

Rather than applying this Court's teachings from *PEPCO*, the Ninth Circuit chose to follow and extend the Fifth Circuit's decision in *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994). See also *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286 (4th Cir. 2002) ("*Brickhouse*"). To the extent that *Abbott* and *Brickhouse* create a legal rule whereby a worker with the factual capacity to earn wages is nevertheless treated as totally disabled in order to secure more compensation for an injured worker, these decisions are at least questionable. As they form the lynchpin for the Ninth Circuit's ruling here, this case could provide a suitable vehicle to review that rule. But even if *Abbott* and *Brickhouse* were correctly decided, they do not justify the Ninth Circuit's departure from *PEPCO*. Neither *Abbott* nor *Brickhouse* involved a scheduled injury and thus neither raises the *PEPCO* concerns. The decision below is inconsistent with *PEPCO* whether or not *Abbott* and *Brickhouse* were correctly decided.

On this issue, as well, the Ninth Circuit has ignored the clear intent of Congress in order to reach a result motivated by sympathy rather than a proper application of the LHWCA. This Court should grant review to enforce the doctrine that it recognized in *PEPCO*, restore the statutory meaning that Congress intended, and protect the legitimate interests of both workers and employers.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RAYMOND H. WARNS, JR.

Counsel of Record

ROBERT J. BURKE, JR.

HOLMES WEDDLE & BARCOTT

999 Third Ave., Suite 2600

Seattle, WA 98104

(206) 292-8008

MICHAEL F. STURLEY

727 East Dean Keeton St.

Austin, TX 78705

(512) 232-1350

APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Ninth Circuit filed March 2, 2005.....	App. 1
Decision and Order of the United States Department of Labor, Benefits Review Board, dated May 13, 2003	App. 32
Decision and Order of the United States Department of Labor, Administrative Law Judge Awarding Benefits, dated May 8, 2002.....	App. 63
Opinion of the United States Court of Appeals for the Ninth Circuit, denying petition for rehearing en banc, filed May 20, 2005.....	App. 89
Section 8(c)(1)-(20) of the LHWCA, 33 U.S.C. §§ 908(c)(1)-(20)	App. 91
Section 8(c)(21) of the LHWCA, 33 U.S.C. § 908(c)(21)	App. 94
Section 8(h) of the LHWCA, 33 U.S.C. § 908(h)	App. 95
Section 10(a) of the LHWCA, 33 U.S.C. § 910(a).....	App. 96
Section 10(c) of the LHWCA, 33 U.S.C. § 910(c)	App. 96
20 C.F.R. § 701.301(7)	App. 97

App. 1

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONSTRUCTION COMPANY;
LIBERTY NORTHWEST INSURANCE
CORP.,

Petitioners,

v.

ROBERT CASTRO; DIRECTOR,
OFFICE OF WORKERS COMPENSATION
PROGRAMS,

Respondents.

No. 03-72528

OWCP No. 14-129-450

BRB No. 02-0783

OPINION

Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted
December 10, 2004 – Portland, Oregon

Filed March 2, 2005

Before: Thomas G. Nelson and Johnnie B. Rawlinson,
Circuit Judges, and William W Schwarzer,*
Senior District Judge

Opinion by Judge Schwarzer

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Raymond H. Warns, Jr., Holmes Weddle & Barcott, Seattle, Washington, for the petitioners.

William D. Hochberg and Nicole A. Hanousek, Law Office of William D. Hochberg, Edmonds, Washington, for respondent Robert Castro.

Peter B. Silvain, Jr., Attorney, U.S. Department of Labor, Washington, D.C., for respondent Director, OWCP.

Roger A. Levy, Laughlin, Falbo, Levy & Moresi LLP, San Francisco, California, for amicus curiae Longshore Claims Association.

OPINION

SCHWARZER, Senior District Judge:

General Construction Co. and Liberty Northwest Insurance Corp. (General Construction), with amicus Longshore Claims Association (LCA), petition for review of the determination of the Benefits Review Board (BRB) that claimant Robert Castro is entitled to total disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (LHWCA), during his period of participation in a vocational rehabilitation program approved by the Office of Workers' Compensation Programs (OWCP). General Construction also claims that the method the administrative law judge (ALJ) used to calculate Castro's average weekly wage was incorrect and that the OWCP violated General Construction's procedural rights under the Administrative Procedure Act (APA) and the Due Process Clause of the federal Constitution.

App. 3

We deny the petition for review. The BRB appropriately affirmed the ALJ's award under the LHWCA, and the ALJ's wage calculation was correct under Ninth Circuit law. The BRB also correctly concluded that the OWCP's failure to grant General Construction a hearing before approving Castro's rehabilitation program did not violate General Construction's procedural or due process rights.

STANDARD OF REVIEW

Under the LHWCA, we review BRB decisions "for errors of law and for adherence to the substantial evidence standard." See *Alcala v. Dir., OWCP*, 141 F.3d 942, 944 (9th Cir. 1998). The BRB must accept the ALJ's factual findings if they are supported by substantial evidence. 33 U.S.C. § 921(b)(3); see also *Lockheed Shipbuilding v. Dir., OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). "Like the [BRB], this court cannot substitute its views for the ALJ's views." *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991).

On questions of law, including interpretations of the LHWCA, we exercise de novo review. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1261 (9th Cir. 2001). We need not defer to the BRB's construction of the LHWCA, but we "must . . . respect the [BRB's] interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute." *Id.* (quoting *McDonald v. Dir., OWCP*, 897 F.2d 1510, 1512 (9th Cir. 1990)). We also "accord considerable weight to the construction of the statute urged by the Director of the [OWCP] as [s]he is charged with administering" the LHWCA. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 696

(9th Cir. 2002) (quoting *Force v. Dir., OWCP*, 938 F.2d 981, 983 (9th Cir. 1991) (internal quotation marks omitted)). "We will defer to the Director's view unless it constitutes an unreasonable reading of the statute or is contrary to legislative intent." *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)).

BACKGROUND

I. CASTRO'S EMPLOYMENT, INJURY, AND REHABILITATION PROGRAM

Claimant Robert Castro worked as a carpenter and pile driver from 1973 until he was disabled due to his injury in 1998. He began work as a pile driver for General Construction in 1998. On November 20, 1998, Castro slipped and fell on a crane step, tearing the anterior cruciate ligament in his right knee. After three surgeries, Castro was released to return to light duty work in August 2000. Castro attempted to return to work at General Construction, but the job he took, cutting metal plates with a torch while seated, was too strenuous, and his physician, Dr. Mandt, determined that it was beyond Castro's ability. No other light duty work being available at General Construction, Mandt recommended vocational retraining.

General Construction conducted labor market studies, which identified jobs the counselors believed Castro could perform, such as courier, cashier, and security officer. The starting wages for these jobs ranged between \$8.00 and \$10.00 per hour, or between \$16,640 and \$20,800 per year, but with experience, some could pay up to \$25,000 per year. Castro testified that he investigated at least some of these jobs, but found that they were taken. Castro did not

App. 5

investigate other jobs because after commuting costs they would have paid around \$2.00 per hour.

OWCP referred Castro to vocational rehabilitation counselor Carol Williams to develop a rehabilitation plan. She and Castro decided on hotel management by a "process of elimination." As part of his vocational rehabilitation plan, approved by OWCP sometime prior to August 1999 and initiated in August 1999, Castro enrolled in a hotel tourism program at a local college. He was scheduled to take classes from September 13, 2000, through June 7, 2002. Evidence suggested that after completing the program, Castro could expect to earn around \$16,000 initially and to progress, with experience, to approximately \$27,580 per year, or to as much as \$40,000 per year as manager at a larger hotel.¹

Williams disagreed with General Construction's labor-market survey, claiming that the positions identified would be difficult for Castro because of his physical limitations, which included limits on his manual dexterity due to a previous hand surgery. Williams also took the position that Castro would have "a great deal of difficulty" going to school and working at the same time. Castro spent between forty-six and fifty-four hours per week on his vocational program. His commute to school took anywhere from one and one-half to two and one-quarter hours. He spent fifteen to eighteen hours per week in class and another twenty-five hours per week in study and preparation for

¹ In August 2000, sometime after it learned of Castro's rehabilitation plan, General Construction sent a letter to the OWCP disputing the plan and requesting that the District Director transfer the dispute to an ALJ for a hearing. The record does not indicate that the OWCP responded to or acted on this letter.

App. 6

class. While in school, Castro worked briefly in a paid internship, but after working about eighty hours he had to resign due to his vocational program's demands and requirements.

When Williams retired at the end of 2000, Castro began to see a new vocational consultant, Stan Owings. Owings concluded that Castro was limited to sedentary jobs or those requiring only light physical exertion, and stated that some of the jobs General Construction identified are "reasonable examples of jobs and wages currently available to" Castro. Owings also recognized that Castro "may return to work with or without completing the education curriculum in which he is currently enrolled." As of the dates of the hearing before the ALJ, June 20, 2001, and the ALJ's decision, May 8, 2002, Castro had not completed his schooling.

Castro earned \$38,422.57 in 1995, \$38,571.33 in 1996, \$39,648.34 in 1997, and \$39,717.62 in 1998, the year of his injury. General Construction initially paid compensation to Castro based on an average weekly wage of \$988.62. On July 3, 2000, however, General Construction reduced this payment to one based on a \$500 weekly wage, stating that Castro had not produced requested evidence, including earning statements from prior employment supplementing the \$9886.18 he earned at General Construction in the year prior to his injury. On July 11, 2000, General Construction reinstated Castro's compensation based on a recalculated average weekly wage of \$756.65. Castro argued that his weekly wage should be \$1006.60 and, in support of his motion for partial summary judgment, submitted a declaration stating that during the fifty-two weeks before his accident, he worked a total of 201.35

days. The wage records Castro submitted indicate that in most of the weeks he worked, he worked for forty hours.

II. CASTRO'S LHWCA CLAIM

Castro filed a claim with the OWCP in November of 1998, seeking permanent partial disability benefits under the LHWCA's schedule for a 35% impairment to his right knee and seeking temporary and permanent total disability benefits for the period he was enrolled in the vocational rehabilitation program.

In May 2002, following a formal hearing, the ALJ issued a decision finding Castro's scheduled disability rating to be 17% and awarding Castro permanent partial disability benefits on the basis of his knee injury for a period of 48.96 weeks (17% of the statutory 288 weeks), pursuant to 33 U.S.C. § 908(c)(2), (19).² On the issue of Castro's claim for total disability benefits, the ALJ determined that Castro had met his burden of demonstrating inability to return to his usual work (and thus total disability, permitting compensation additional to that for his scheduled injury) but also that General Construction had established the availability of some suitable alternate employment. Nevertheless, the ALJ found that because Castro was enrolled in a vocational rehabilitation program and had shown that completion of the program both precluded employment and gave him the best long-term earning potential, he was entitled to total disability benefits for the duration of the program, under *Louisiana*

² This 2002 hearing on Castro's claim for benefits thus followed OWCP's 1999 approval of Castro's vocational rehabilitation program by several years.

Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 127-28 (5th Cir. 1994).³

With respect to the calculation of Castro's award, the ALJ rejected General Construction's assertion that § 10(c) of the LHWCA, 33 U.S.C. § 910(c), should govern, applying instead § 10(a), 33 U.S.C. § 910(a), in accordance with our holding in *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).⁴

General Construction appealed the ALJ's decision to the BRB, which affirmed the award. The BRB, like the ALJ, found *Abbott* to be controlling and noted that since the ALJ had issued the decision in Castro's case the Fourth Circuit had also followed *Abbott*. *Newport News Shipbuilding & Dry Dock Co. v. Dir., OWCP*, 315 F.3d 286, 295 (4th Cir. 2002). The BRB also upheld the ALJ's use of § 10(a) to calculate Castro's average weekly wage, relying, like the ALJ, on *Matulic*. Finally, the BRB rejected General Construction's claim that the OWCP had violated its procedural rights by refusing to afford it a hearing before an ALJ on the question of the appropriateness of vocational rehabilitation in Castro's case. The BRB noted that the Ninth Circuit has held that neither the LHWCA nor any other authority guarantees employers or insurers a

³ The ALJ acknowledged that *Abbott* does not establish an unqualified entitlement to benefits during vocational rehabilitation but concluded that Castro's situation did not differ from that of the claimant in *Abbott* in any material respects.

⁴ Section 10(a) of the LHWCA provides the presumptive method for calculating wages. Section 10(c) is used only when § 10(a) cannot be "reasonably and fairly" applied. 33 U.S.C. §§ 910(a)-(c); see also *Matulic*, 154 F.3d at 1056. Under § 10(a), the ALJ calculated Castro's total disability benefits as \$669.58 per week, based on an average weekly wage of \$1004.37.

hearing before an ALJ on all disputes. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 1093-95 (9th Cir. 2000). ALJs specifically lack jurisdiction to adjudicate disputes over matters committed to the OWCP Director's discretion. *Id.* at 1095. The BRB concluded that the relevant statutory and regulatory provisions committed the design and approval of vocational rehabilitation plans to the discretion of the Director. Since General Construction was not entitled to a hearing before an ALJ on this issue, the OWCP did not violate General Construction's procedural rights when the OWCP declined to order such a hearing.

General Construction timely appealed all three issues: (1) the applicability of *Abbott* to the present case; (2) the applicability of § 10(c) to the present case; and (3) denial of General Construction's procedural rights.

DISCUSSION

I. LEGAL FRAMEWORK

The LHWCA's compensation scheme distinguishes between injury, which is a physical impairment, "occupational disease[,] or infection," 33 U.S.C. § 902(2), and disability, which the LHWCA defines as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment," *id.* § 902(10). The statutory scheme also provides for four broad classes of benefits, distinguished according to the duration of the underlying injury (permanent or temporary) and the nature or degree of disability (partial or total). *Id.* § 908; *Stevens v. Dir., OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990); *Abbott*, 40 F.3d at 125-28.

A disability is temporary "so long as there [is] a possibility or likelihood of improvement through normal and natural healing." *Stevens*, 909 F.2d at 1259 (citation omitted). After a claimant is shown to have attained "maximum medical improvement," however, the remaining disability is classified as permanent. *Id.* at 1258. A disability may be classified as permanent and benefits paid under the LHWCA's provisions for permanent disability for a finite period. See 33 U.S.C. §§ 908(a) (providing that permanent total disability benefits pay 66⅔% of the employee's average weekly wage for the duration of the disability); 908(c), 908(c)(21) (providing that permanent partial disability benefits pay 66⅔% of the employee's average weekly wage for a length of time determined by schedule or "during the continuance of disability").

A disability is classified as total when (1) a claimant demonstrates that the work-related injury in question renders him unable to return to prior employment, and (2) the employer subsequently fails to establish the availability of suitable alternative employment within the geographic area of the claimant's residence, which the claimant can perform considering the claimant's limitations, age, education, and background, and with a diligent employment search on the claimant's part. See *Bumble Bee Seafoods v. Dir.*, *OWCP*, 629 F.2d 1327, 1329-30 (9th Cir. 1980); *Stevens*, 909 F.2d at 1258.⁵ Disabilities not precluding suitable alternative employment are classified as partial. *Stevens*, 909 F.2d at 1258. In other words, in

⁵ The LHWCA also provides that a disability is classified as total if the underlying injury involves "[l]oss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof." 33 U.S.C. § 908(a).

general, if the claimant is capable of engaging in some gainful work, the disability is partial. *Id.*

Two circuits, the Fifth and the Fourth, have added another element to this basic test for distinguishing between total and partial disability. Under their precedent, a claimant who is enrolled in a vocational rehabilitation program and can demonstrate that the program entirely precludes him from engaging in otherwise suitable employment may receive total disability benefits for the duration of the program. *Abbott*, 40 F.3d at 127; *Newport News*, 315 F.3d at 295. In *Abbott*, an opinion by retired U.S. Supreme Court Justice Byron White, the Fifth Circuit reasoned that although the Act does not explicitly provide for total disability during rehabilitation training, such an interpretation is consistent with "the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force." *Abbott*, 40 F.3d at 127 (citation omitted). The validity of this standard in the Ninth Circuit is one of the issues in the present case.

Benefits for total disability, whether temporary or permanent, are calculated on the basis of the claimant's "average weekly wages" and awarded for the "continuance" of the disability. 33 U.S.C. §§ 908(a), (b). Benefits for partial disability, whether temporary or permanent, are awarded according to one of two statutory schemes. See *Potomac Elec. Power Co. v. Dir., OWCP (Pepco)*, 449 U.S. 268, 270-71 & n.1 (1980); 33 U.S.C. §§ 908(c), 908(c)(21). For particular statutorily enumerated, or "scheduled," injuries, the LHWCA sets forth formulas for calculation of benefits. 33 U.S.C. § 908(c). For injuries that do not fall into any of the scheduled categories, benefits for partial

disability are awarded on the basis of the claimant's reduction in earning capacity resulting from the injury. *Id.* § 908(c)(21). These remedies are exclusive; a claimant with a scheduled injury may not elect earning-capacity-based benefits. *Pepco*, 449 U.S. at 273-80. However, under the statutory scheme the distinction between scheduled and unscheduled injuries is pertinent only to the calculation of permanent *partial* disability benefits; the distinction has no bearing on benefits for *total* disability. See 33 U.S.C. § 908(c) (setting forth schedule formulas for calculating "[p]ermanent partial disability"); see also *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 Ben. Rev. Bd. Serv. (MB) 195, 198 (2001); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 Ben. Rev. Bd. Serv. (MB) 264, 265-66 (1998).

All of the above calculations require an initial determination of the claimant's "average weekly wage at the time of the injury." See 33 U.S.C. § 910. Three different formulas for determination of this amount are set forth at 33 U.S.C. §§ 910(a)-(c). The selection of the proper formula in Castro's case is also at issue in this appeal.

II. CASTRO'S ENTITLEMENT TO TOTAL DISABILITY DURING VOCATIONAL REHABILITATION

The ALJ in the present case found *Abbott* applicable to Castro's case and held that Castro was entitled to total disability benefits for the period during which he was enrolled in his vocational rehabilitation program. On appeal, General Construction argues (1) that *Abbott* was wrongly decided and should not be applied to this case and (2) that even if *Abbott* was correct on its facts, Castro's case is distinguishable. We address these arguments in turn.

A. Abbott Is Consistent with the LHWCA's Text and Purpose

The interpretation of the LHWCA found in *Abbott* and *Newport News* and adopted by the OWCP Director in this case is supported by the language of the LHWCA and its purpose.

The LHWCA does not specifically provide that total disability benefits are to be awarded where a claimant shows that participation in a rehabilitation program precludes acceptance of alternative employment. But the statute's silence is not determinative. In fact, the statute is generally silent on the scope and definition of "total disability." See 33 U.S.C. § 908(a) (providing that where claimant has not lost two major body parts, the existence of "total disability shall be determined in accordance with the facts"). As the Fifth Circuit noted in *Abbott*, the statute leaves it to the courts to "enunciate standards for distinguishing between the various categories" of disability – total and partial as well as permanent and temporary. 40 F.3d at 125-26.

The *Abbott* rule is consistent with the language and a principal policy of the LHWCA: the encouragement of vocational rehabilitation. The LHWCA specifically provides that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange . . . for such rehabilitation." 33 U.S.C. § 939(c)(2). Moreover, the LHWCA defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Thus, the LHWCA speaks of disability in terms of economic harm, not just physical harm. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 126-27 (1997). The *Abbott* rule, consistently with

this definition, simply clarifies that it is possible for a claimant to be entitled to benefits for "total disability" when the claimant is physically capable of performing certain work but unable to secure that work for some other reason. See *Abbott*, 40 F.3d at 127; see also *Newport News*, 315 F.3d at 295.

Amicus LCA argues that *Abbott* was wrongly decided because in 1984 Congress considered and failed to pass amendments to the LHWCA creating a statutory entitlement to total disability for all claimants during vocational rehabilitation training. We note at the outset that congressional inaction is not a reliable guide to legislative intent. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.") (internal quotations and citations omitted); *United States v. Wise*, 370 U.S. 405, 411 (1962). Moreover, the failed amendments in this case would have been more sweeping than *Abbott's* rule, since they would have created an entitlement to disability benefits during rehabilitation. H.R. 7610, 96th Cong., 2d Sess. at 19-20 (1980) (providing that "[a]n employee who as a result of injury is undergoing vocational rehabilitation . . . shall be entitled to receive continued temporary total or partial compensation during . . . such rehabilitation").⁶ In contrast, the *Abbott* rule

⁶ See also H.R. Rep. No. 98-570, pt. I, at 83 (1983) (including comments from sponsor of H.R. 7610 (1980) noting that compromises on LHWCA amendments included the elimination of "amendments concerning vocational rehabilitation which assured continued payment of benefits during rehabilitation").

requires a fact-finder to consider on a case-by-case basis an injured worker's participation in a rehabilitation program as one factor in determining whether suitable alternative employment is available to that worker. Cf. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 Ben. Rev. Bd. Serv. (MB) 221 (2000) (applying *Abbott* and denying temporary total disability benefits when claimant failed to show that enrollment in rehabilitation program precluded acceptance of alternate employment); *Gregory*, 32 Ben. Rev. Bd. Serv. (MB) 264 (same). Congress's failure to enact an amendment more sweeping than the *Abbott* rule cannot be taken to invalidate that rule. The text, purposes, and legislative history of the LHWCA thus provide no basis for rejecting the *Abbott* approach.⁷

B. Abbott Applies to the Present Case

General Construction further argues that even if *Abbott* is a valid interpretation of the LHWCA, it is inapplicable here because Castro's situation differs significantly from that of the claimant in *Abbott*. Specifically, (1) Castro's program did not involve an agreement with the OWCP that expressly forbade his employment during the program; (2) General Construction itself never agreed to

⁷ General Construction and LCA also invoke the language of § 8(g) of the LHWCA in support of the contention that the only money Congress intended to be provided to claimants during vocational rehabilitation is a \$25 maintenance stipend. 33 U.S.C. §§ 908(g), 944. This argument ignores the plain language of the statute. Section 8(g) states that an injured worker in vocational rehabilitation who is being rendered fit for remunerative occupation "shall receive *additional* compensation necessary for his maintenance, but such *additional* compensation shall not exceed \$25 a week." 33 U.S.C. § 908(g) (emphasis added). This language indicates Congress's intent that the fee be paid in addition to – not in place of – other appropriate compensation.

the rehabilitation plan; (3) the evidence showed Castro could work while enrolled in his rehabilitation program; (4) Castro was not diligent in attempting to locate work while pursuing the program; (5) completion of the program would not increase Castro's earning capacity; and (6) Castro, unlike the claimant in *Abbott*, suffered scheduled injuries, and *Pepco* therefore limits Castro to recovery under the LHWCA's schedule.

We agree with the Fourth Circuit in *Newport News* that *Abbott* did not set forth a rigid rule and that a number of factors enumerated by the BRB may be relevant to determining whether an individual may receive benefits while enrolled in a rehabilitation program. These include whether enrollment in the rehabilitation program precludes any employment; whether the employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and whether the claimant showed full diligence in completing the program. *Newport News*, 315 F.3d at 293 (citing *Gregory*, 32 Ben. Rev. Bd. Serv. 264). The Fourth Circuit observed that no one of these factors, standing alone, should necessarily be considered determinative. 315 F.3d at 295-96.

With respect to General Construction's first argument, the ALJ noted that the BRB has interpreted *Abbott* to require only that a claimant show that, as a practical matter, he cannot obtain suitable alternative employment, not that he is contractually precluded from working. See *Kee*, 33 Ben. Rev. Bd. Serv. at 223. This approach makes sense given the language and purposes of the LHWCA, which provides for compensation for a claimant's reduced earning capacity under a variety of circumstances. See,

e.g., 33 U.S.C. §§ 902(10) (defining "disability"), 908(a) (providing for determination of permanent total disability "in accordance with the facts"). A claimant's earning capacity suffers as a result of his inability to engage in alternative employment, regardless of the cause of that inability. We agree with the ALJ that neither *Abbott* nor the LHWCA should be read to require that the inability have a contractual basis.

With respect to General Construction's second argument, the ALJ noted that General Construction objected to the rehabilitation plan and to continued benefits. But the ALJ also reasoned that allowing employers an effective veto power over OWCP-approved rehabilitation programs would undermine the LHWCA's general policy of encouraging rehabilitation. We agree. There was no error in the ALJ's decision that General Construction's objection to the rehabilitation program does not sufficiently distinguish Castro's case from *Abbott*.

With respect to General Construction's third argument, regarding evidence of Castro's ability to work while pursuing his rehabilitation program, the ALJ evaluated relevant evidence, including the testimony of Castro and vocational experts Carol Williams and Kent Shafer. The ALJ based his decision that Castro could not work while pursuing his program mainly on Castro's uncontradicted testimony that, including commuting, class, and study time, he devoted between forty-six and fifty-four hours per week to completion of the program.⁸ General Construction

⁸ Williams stated that Castro's intellectual capacity and long commute would make combining school with a job difficult, while Shafer noted that travel requirements combined with cognitive capacity could prevent some people from working while in school.

notes that Castro worked briefly in a paid internship. But Castro had to resign this internship after eighty hours of work because of the demands of his rehabilitation program. The ALJ found this to be evidence that Castro was willing but unable to work, despite testimony to the contrary by General Construction's expert. The ALJ's factual finding is supported by substantial evidence. 33 U.S.C. § 921(b)(3); *Container Stevedoring Co.*, 935 F.2d at 1546.

The ALJ similarly considered General Construction's fourth argument, that Castro failed to show he searched diligently for work while pursuing his rehabilitation program. This argument is largely foreclosed by the ALJ's determination that the time demands of Castro's program precluded his employment during the program. Castro also presented evidence that he investigated jobs identified by General Construction but found them either unavailable or impracticable because of his commute. The ALJ's finding is thus supported by substantial evidence.

The ALJ also found that Castro was diligent in completing his program. *See Newport News*, 315 F.3d at 293 (citing *Gregory*, 32 Ben. Rev. Bd. Serv. 264). The ALJ found that, although Castro expressed concerns about falling behind in school, his records indicated that his enrollment since 1999 had not been significantly interrupted and that at the time of the hearing he was on schedule to complete his program. The ALJ's finding that Castro had pursued his degree in the program diligently is supported by substantial evidence.

The ALJ also considered General Construction's fifth argument, that *Abboitt* should not apply because Castro's rehabilitation program was not designed to improve his

earning capacity. The ALJ noted that, although hotel management starting salaries were comparable to the salaries in the jobs General Construction had identified, Castro's vocational advisors reasonably determined that training in hotel management would give Castro the best long-term earning potential.⁹ The ALJ was correct to focus on Castro's long-term wage-earning prospects in assessing the rehabilitation program, *see Newport News*, 315 F.3d at 295-95 ("an immediate increase in wage earning capacity ... is not ... determinative"); *Abbott*, 40 F.3d at 128 (looking to employee's long-term increase in wage-earning capacity in assessing reasonableness of vocational rehabilitation program), and his factual determination that Castro's rehabilitation program provided the best long-term wage-earning prospects is supported by substantial evidence.

Neither the ALJ nor the BRB considered at length General Construction's argument concerning the application of *Pepco*, 449 U.S. 268 (1980), to Castro's case. However, the ALJ's interpretation of the scope of *Pepco* correctly precluded application of that case to Castro's claim for total disability benefits during his rehabilitation program. In *Pepco*, the Supreme Court held that where a claimant is entitled to partial disability benefits for a scheduled injury, those benefits are the claimant's exclusive remedy; a claimant with a scheduled injury may not elect to recover benefits for partial disability on the basis of the claimant's loss in earning capacity. *Id.* at 273-74. General Construction argues that if a claimant has a

⁹ Williams estimated that Castro could earn between \$30,000 and \$40,000 annually as a hotel manager, as compared to the \$16,640 to \$25,000 potential of the jobs identified by General Construction.

scheduled injury, and the employer shows that the claimant is employable, the claimant cannot also be entitled to an award of total disability benefits during a rehabilitation program; the argument implies that allowing recovery for the time spent in the rehabilitation program is analogous to allowing recovery for a loss in earning capacity. The argument fails because, as the ALJ correctly noted, *Pepco* addresses only the statutory provisions for partial disability benefits. *See id.* at 274 & n.8; see also *Brown*, 34 Ben. Rev. Bd. Serv. at 198 (finding scheduled nature of claimant's injury irrelevant to appropriateness of rehabilitation program and award of benefits for that period); *Gregory*, 32 Ben. Rev. Bd. Serv. at 265-66 (noting that "where claimant is totally disabled the schedule does not apply" and that "the fact that any permanent partial disability would be covered by the schedule is not determinative of the total disability issue"). Since *Pepco* does not address computations of awards for temporary total disability, which is the focus of the *Abbott* rule, we agree with the ALJ and the BRB that the scheduled or unscheduled nature of a claimant's injury is irrelevant.

We conclude that the ALJ and BRB did not err in finding that Castro's case did not differ materially from *Abbott* and *Newport News* so as to preclude application of the *Abbott* rule. We therefore affirm the award of permanent total disability benefits to Castro during his participation in his OWCP-approved rehabilitation program.

III. CALCULATION OF AVERAGE WEEKLY WAGE

General Construction contends that the ALJ erred in calculating Castro's average weekly wage under § 10(a) of the Act, 33 U.S.C. § 910(a). Although § 10(a) is presumed

to apply absent a showing that its application would be unreasonable, and although the ALJ properly applied this provision under Ninth Circuit precedent, *Matulic*, 154 F.3d 1052 (9th Cir. 1998), General Construction argues that we should overrule that precedent or at least distinguish it.

The relevant subsections of § 10 of the Act state:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding the injury, his average annual earnings shall consist of . . . two hundred and sixty times the average daily wage or salary for a five-day worker. . . .

(c) If . . . the foregoing methods of arriving at the average annual wage of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality.

...

Section 10(a) plainly applies if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding the injury." 33 U.S.C. § 910(a). In *Matulic*, we addressed the meaning and scope of the language "substantially the whole of the year immediately preceding [the] injury." 154 F.3d at 1056. Noting that "some 'overcompensation' is built into the [LHWCA] system institutionally," we concluded that the LHWCA's language did not require a claimant to have worked 100% of the potential working days during the year immediately preceding the injury in order for § 10(a) to apply "reasonably and fairly." *Id.* at 1057. Specifically, we held that § 10(a) presumptively applies "when a claimant works more than 75% of the workdays of the measuring year."¹⁰ *Id.* at 1058. It may even apply when the claimant has worked less than 75% of these days, if the reduction in working days is "atypical of the worker's actual earning capacity." *Id.*¹¹ In *Matulic*, the claimant worked 213 days in the relevant year, or 82% of the statutory 260 days. *Id.* at 1058. We recently approved application of *Matulic* and § 10(a) where a claimant worked 197 days, or 75.77% of

¹⁰ We based this conclusion in part on our observation in an earlier case that "the point at which the disparity between the claimant's actual days worked and the [potential days worked] becomes unreasonable or unfair, [triggering application of § 10(c),] is 'a question of line-drawing.'" *Matulic*, 154 F.3d at 1057-58 (quoting *Duncanson-Harrelson Co. v. Dir.*, OWCP, 686 F.2d 1336, 1343 (9th Cir. 1982)). We determined in *Matulic* that the 75% threshold was an appropriate place to draw this line. 154 F.3d at 1057-58.

¹¹ We further noted that § 10(c) "may not be invoked in cases in which the only significant evidence that the application of [§ 10(a)] would be unfair or unreasonable is that claimant worked more than 75% of the days in the year preceding his injury." *Matulic*, 154 F.3d at 1058-59.

the statutory total. *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 884-85 (9th Cir. 2004).

General Construction argues that (1) *Matulic* is contrary to the language of the LHWCA and should be overruled and that (2) even if *Matulic* is good law, it does not apply to Castro's case. We consider each of these arguments in turn.

A. *Matulic* Is Good Law

General Construction's primary arguments for overruling *Matulic* are as follows: (1) *Matulic* permits and promotes overcompensation of claimants, a result contrary to the plain language of the LHWCA; (2) the 75% bright line drawn in *Matulic* creates absurd results; (3) *Matulic* is inconsistent with the law in other circuits and with the reasoning in relevant Supreme Court precedent.

To begin, we note that "[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions." *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 983 (9th Cir. 2002) (citation omitted). Because none of these conditions applies, we reject General Construction's arguments. Even if we had the capacity to overrule *Matulic*, however, we would reach the same conclusion.

In *Matulic* itself, we addressed concerns about whether potential overcompensation was consistent with the purposes of the LHWCA. 154 F.3d at 1057. We noted that no one in the country works every working day of every work week and that Congress must have known that some overcompensation would result from the standard work year of 260 days provided for in the LHWCA. *Id.* We

reasoned that any inaccuracies in estimating wage-earning capacity should normally favor the worker, given the "humanitarian purposes" of the Act and our mandate to construe its provisions broadly in favor of workers. *Id.*¹² General Construction rests virtually its entire argument that the LHWCA reflects a policy against overcompensation on the existence of § 10(c), which acknowledges the possibility that weekly wage calculations may be unfair or unreasonable in some circumstances. Given the virtual inevitability of overcompensation under § 10(a), we decline to interpret the existence of § 10(c) as a statutory bar to any application of the LHWCA resulting in arguable overcompensation.

General Construction's absurdity argument rests on the contention that a worker who has worked 75% of the statutory days will have worked an average of 3.75 days per week, but under § 10(a) will receive the same compensation as a worker who worked 5 days per week. This argument would appear to attack not only the line drawn in *Matulic* but also the drawing of a line at all. General Construction does not explain when such a disparity would not rise to the level of absurdity; if any disparity between actual hours worked and compensation is an absurd result, as General Construction's argument implies, then no claimant who worked less than 100% of the statutory 260 days would be entitled to application of § 10(a). Yet the plain language of § 10(a) itself does not

¹² It should also be noted that whether "overcompensation" occurs at all under *Matulic* is questionable. The LHWCA does not compensate for, among other things, lost pay increases or the lost value of fringe benefits. These gaps in compensation may be partly responsible for Congress's decision to provide for calculation methods that would tend to overcompensate for time worked rather than to undercompensate.

require this. Rather, the subdivision applies to claimants who have worked "*substantially* the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a) (emphasis added). "Substantially" would be meaningless if we were to follow General Construction's suggested interpretation of § 10(a), and as a result we decline to do so.

General Construction also argues that *Matulic* is inconsistent with the law in other circuits and with Supreme Court precedent. The only circuit opinion cited reaching a result contrary to *Matulic* is *Strand v. Hansen Seaway Service, Inc.*, 614 F.2d 572 (7th Cir. 1980). But we acknowledged and rejected *Strand* in *Matulic* itself, noting "[w]e do not believe such a rigid rule [requiring use of § 10(c) where claimant had worked 84% of the days in the statutory year] is consistent with the intent or purpose of the [LHWCA]." *Matulic*, 154 F.2d at 1058 n.4. General Construction offers no compelling reason for us to revisit this conclusion.

General Construction also cites the Supreme Court's opinion in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).¹³ But the limited, technical holding in *Greenwich Collieries*¹⁴ is irrelevant to the soundness of our

¹³ This opinion predates our decision in *Matulic*, so that General Construction's reliance on it amounts, again, to a contention that *Matulic* was wrongly decided – not to an argument that intervening Supreme Court precedent requires us to reject *Matulic*'s rule.

¹⁴ In *Greenwich Collieries*, the Supreme Court rejected an evidentiary rule devised by the Department of Labor for use in benefits claims cases where an ALJ found the evidence on a disputed question to be in equipoise. 512 U.S. at 269. Under this "true doubt" rule, the ALJ was to resolve such questions in the claimant's favor. *Id.* The Supreme Court rejected this rule as contrary to the language of the governing statutes. *Id.* at 280-81. But the Court also implicitly distinguished the true doubt rule from other procedural and interpretive techniques favoring

(Continued on following page)

decision in *Matulic* to interpret § 10(a) broadly in light of the remedial purposes of the LHWCA. See 154 F.3d at 1055, 1057. Even were we empowered to overrule *Matulic*, General Construction has presented no convincing reason for us to do so.

B. Matulic Applies to the Present Case

General Construction argues that even if we do not overrule *Matulic*, we should not apply it to the present case because the decision of the ALJ and BRB that § 10(a) could "reasonably and fairly" be applied was not supported by substantial evidence. 33 U.S.C. § 910(c). General Construction maintains that use of § 10(a) to compute Castro's award amounts to an unfair and unreasonable windfall.

This approach has been foreclosed by *Matulic* itself, which established as a matter of law that application of § 10(a) to a claimant who had worked 75% or more of the statutory 260 days is not unfair or unreasonable. 154 F.3d at 1058-59. During the year preceding his injury, Castro worked 201.35 days out of 260, approximately 77.4% of the year. His case fits precisely within the rule established in *Matulic*. The fact that he worked fewer days than did the claimant in *Matulic* is not, under the reasoning in that

claimants under remedial statutes such as the LHWCA. See *id.* at 280 ("In part due to Congress' recognition that claims such as those involved here would be difficult to prove, claimants ... benefit from certain statutory presumptions easing their burden. Similarly, the Department's solicitude for benefits claimants is reflected in the regulations adopting additional presumptions. But with the true doubt rule the Department attempts to go one step further.") (internal quotation marks and citations omitted).

decision, a basis for distinguishing the case or refusing to apply its rule.¹⁸ *Id.*

General Construction also argues that, unlike the claimant in *Matulic*, Castro never earned a weekly wage comparable to the result of the § 10(a) calculation in his case. It notes that the difference between the annual wage resulting from a § 10(a) calculation and Castro's actual earnings in the previous year is approximately \$12,000. This is not significantly different from the situation in *Matulic* itself, in which under § 10(a) the claimant received a wage increase of approximately \$10,000. 154 F.3d at 1056. It is true that we found the previous year's earnings of the claimant in *Matulic* to have been anomalously low. *Id.* at 1058. However, that finding was not the basis for our articulation of the bright-line 75% rule. *Id.* at 1058-59. We based our holding in *Matulic* on an examination of the purposes of the LHWCA, not the fairness of the result in the particular case. *See id.* at 1057-59. The factual distinction noted by General Construction is therefore irrelevant to whether or not *Matulic* applies to the present case. The ALJ and BRB accordingly did not err in applying *Matulic* and approving calculation of Castro's average weekly wage under § 10(a).

IV. GENERAL CONSTRUCTION'S PROCEDURAL RIGHTS

General Construction argues that it demanded, but was improperly denied, a hearing before an ALJ to determine the

¹⁸ We even noted in *Matulic* that it might be neither unfair nor unreasonable to apply § 10(a) in a case involving a claimant who had worked less than 75% of 260 days. 154 F.3d at 1058.

necessity of a vocational rehabilitation program for Castro before that plan was implemented. According to General Construction, the LHWCA provides it with the right to an ALJ hearing upon request. 33 U.S.C. § 919(c), (d). General Construction also contends that the OWCP violated its Fifth Amendment due process rights when the OWCP imposed compensation liability on General Construction for the duration of a rehabilitation plan into which it had no input.¹⁶ We address these arguments in turn.

A. The OWCP Did Not Violate General Construction's Statutory Procedural Rights

The LHWCA provisions General Construction cites state only that "the deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon," 33 U.S.C. § 919(c), and that such hearings will be governed by the APA. *Id.* § 919(d).

We recently described the scope of § 919(c) in *Healy Tibbitts*, 201 F.3d at 1094. We held that "section 919(c)

¹⁶ General Construction also argues more broadly that the rule in *Abbott* is "unconstitutional" because it deprives employers of due process. But an employer may receive a hearing if it controverts or contests an injured employee's claim for benefits. See 33 U.S.C. §§ 914(d), (h). And if an ALJ determines that an employer paid a claimant more in benefits than required by law, the ALJ may order deduction of the overpayment from future payments to the claimant. See, e.g., *Bush v. I.T.O. Corp.*, 32 Ben. Rev. Bd. Serv. (MB) 213, 215 n.5 (1998) (noting ALJ's order that overpayment be recovered by deductions from claimant's continuing benefit payments). Given these safeguards, *Abbott* puts employers at no risk of suffering any kind of permanent wrongful deprivation.

does not necessarily require an evidentiary hearing before an ALJ on all contested issues." *Healy Tibbitts*, 201 F.3d at 1093. We held that ALJs in fact lack jurisdiction over certain disputes, in particular those involving "strictly legal issues," *id.* at 1095, and matters within the discretion of a District Director turning on assessments of "reasonableness" and not involving factual questions resolvable by an ALJ, *id.* at 1097. Thus, the existence of a dispute does not in itself trigger a right to a hearing under the LHWCA.

The dispute in the present case concerned the initial reasonableness of the vocational rehabilitation plan undertaken by Castro and approved by the OWCP. This determination, while not entirely a legal issue, *Healy Tibbitts*, 201 F.3d at 1095, turned on a "reasonableness" decision and did not require any factual determinations of disputed issues by an ALJ, *id.* at 1097. Moreover, the LHWCA and its accompanying regulations commit the direction and therefore also the approval of such rehabilitation programs to the discretion of the Director. See 33 U.S.C. § 939(c)(2) ("The Secretary shall direct the vocational rehabilitation of permanently disabled employees."); 20 C.F.R. §§ 701.202 (delegating to OWCP Director authority for administering LHWCA), 701.301(a)(6), (7) (delegating to District Director administrative approval authorities of OWCP Director), 702.506 (providing that "[t]he vocational rehabilitation advisor shall arrange for and develop all vocational training programs"). Under *Healy Tibbitts*, the LHWCA did not entitle General Construction to an ALJ hearing on the reasonableness of Castro's rehabilitation plan prior to the implementation of that plan.

General Construction also argues that the failure to afford it a hearing violated the APA. But § 919(d) merely requires that any hearings ordered by the Director be conducted in accordance with the APA. 33 U.S.C. § 919(d); *see also Healy Tibbitts*, 201 F.3d at 1094. If no hearing is required, no question as to whether the APA has been violated can arise. We conclude that the OWCP's failure to order an ALJ hearing regarding Castro's rehabilitation program prior to approval of the program did not violate the provisions of the LHWCA.

B. The OWCP Did Not Violate General Construction's Constitutional Due Process Rights

General Construction claims it was entitled to a hearing before an ALJ prior to implementation of the vocational rehabilitation program, which deprived it of property by requiring payment of benefits to Castro, in violation of the Due Process Clause of the Fifth Amendment. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).¹⁷

The flaw in General Construction's argument is that the OWCP's implementation of Castro's rehabilitation plan did not, in itself, deprive General Construction of its

¹⁷ Specifically, General Construction argues that it "had a direct financial stake in whether the vocational plan concocted by the consultant hired by the Department of Labor went forward because, under *Abbott*, it was going to be liable for total disability compensation under that program." As noted, any liability for compensation on General Construction's part under *Abbott* did not arise until Castro had (1) filed a claim for benefits and (2) at a hearing, carried his burden of showing that his rehabilitation program precluded his employment. *See Kee*, 333 Ben. Rev. Bd. Serv. at 223 (holding that claimant has burden of showing that "suitable alternative jobs were realistically unavailable while he was in the [rehabilitation] program").

property, since that implementation did not automatically trigger payment of permanent benefits to Castro. When the issue of disability compensation arose with Castro's filing of a claim for benefits, the District Director properly forwarded the matter to the Office of Administrative Law Judges for further handling, and an ALJ held a full hearing on the merits of Castro's claim for benefits. General Construction received notice and an opportunity to submit evidence and argument before the ALJ's decision awarding compensation and before it was required to pay anything. This constituted a sufficient predeprivation hearing. See *Mathews*, 424 U.S. at 333 (1976) (requiring the opportunity to be heard "at a meaningful time and in a meaningful manner") (internal quotation marks and citations omitted); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (requiring that a party have the opportunity for "some kind of a hearing" before being deprived of a significant property interest) (citation omitted). We conclude, therefore, that the OWCP's handling of Castro's claim for benefits did not deprive General Construction of its due process rights under the federal Constitution.

CONCLUSION

For the above-stated reasons, we DENY the petition for review.

DENIED.

U.S. Department of Labor Benefits Review Board
P.O. Box 37601 [SEAL]
Washington, DC 20013-7601

BRB No. 02-0783

ROBERT CASTRO)	
Claimant-Respondent)	
v.)	PUBLISHED
GENERAL CONSTRUCTION)	DATE ISSUED:
COMPANY)	<u>May 13 2003</u>
and)	
LIBERTY NORTHWEST)	
INSURANCE COMPANY)	
Employer/Carrier-)	
Petitioners)	
DIRECTOR, OFFICE OF)	
WORKERS' COMPENSA-)	
TION PROGRAMS)	
Respondent)	
LONGSHORE CLAIMS)	
ASSOCIATION)	
<i>Amicus Curiae</i>)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malmphy, Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek (Law Offices of William D. Hochberg), Edmonds, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Samuel J. Oshinsky, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for *amicus curiae*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-515) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case in Seattle, Washington on January 29, 2003, and pursuant to 20 C.F.R. §802.215, we hereby accept the pleadings filed by employer and by the *amicus curiae* subsequent to the oral argument.

The parties do not dispute the facts of this case. Claimant worked as a pile driver for employer, and on November 20, 1998, he fell, tearing the anterior cruciate ligament in his right knee. After undergoing and recovering from reconstructive surgery on December 30, 1998, and two subsequent surgeries, claimant was released to return to light duty work on August 14, 2000. Claimant attempted to return to work at employer's facility, but the

job proved to be too strenuous, and Dr. Mandt determined that the duties were beyond claimant's restrictions.¹ Because employer offered no other light duty work, Dr. Mandt recommended vocational retraining.

Employer hired firms to conduct labor market studies, and those surveys identified jobs the counselors believed claimant could perform with starting wages ranging from \$8 to \$10 per hour. Cl. Ex. 8; Emp. Ex. 3. The Office of Workers' Compensation Programs (OWCP) referred claimant to a vocational rehabilitation counselor, Ms. Williams, to develop a rehabilitation plan. Based on their collaborative effort, claimant enrolled in a hotel tourism program at a local college and was scheduled to take classes from September 13, 2000, through June 7, 2002. Cl. Ex. 5. Upon completion of the program, claimant was expected to earn approximately \$16,000 per year in an entry-level position and then, with experience, progress up to approximately \$27,580 per year or possibly \$30-40,000 per year if he became an assistant manager or a manager at a larger hotel. Emp. Ex. 5. As of the date of the hearing, June 20, 2001, and the date of the administrative law judge's decision, May 8, 2002, claimant had not completed his schooling. Claimant filed a claim seeking permanent partial disability benefits under the schedule for a 35 percent impairment to his right knee and temporary and permanent total disability benefits while enrolled in the vocational rehabilitation program.

The administrative law judge awarded claimant permanent partial disability benefits for a period of 48.96

¹ Claimant had also attempted to return to work between June 14 and July 13, 1999.

weeks (17% of 288) pursuant to Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19). Decision and Order at 10. On the issue of total disability benefits, the administrative law judge determined that claimant demonstrated an inability to return to his usual work and that employer established the availability of suitable alternate employment. Decision and Order at 4, 11. He found that the jobs identified by Messrs. Ewald and Shafer, experts hired by employer, and affirmed by Mr. Owings, who inherited claimant's case after Ms. Williams retired, constituted suitable alternate employment. Cl. Ex. 8; Emp. Exs. 3, 5. Nevertheless, because claimant was enrolled in a vocational rehabilitation program, the administrative law judge awarded claimant total disability benefits for the duration of the program pursuant to *Abbott v. Louisiana Insurance Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Decision and Order at 11. Although the administrative law judge acknowledged that *Abbott* does not apply in every case where the claimant is enrolled in vocational rehabilitation, he applied it to this case because he found claimant demonstrated that enrollment in the program precluded employment in light of claimant's commuting time, class time, and study time, and that participation in the program would give claimant the best long-term earning potential. Decision and Order at 11-13. Accordingly, he awarded claimant temporary total disability benefits from July 14, 1999, until August 13, 2000, when claimant's condition reached maximum medical improvement, and permanent total disability benefits thereafter until June 7, 2002, the projected date of completion of the program. Decision and Order at 1 n.1, 13, 15. Finally, the administrative law judge rejected employer's assertion that claimant's average weekly wage should be calculated using Section 10(c), 33 U.S.C. §910(c),

accepted claimant's argument that use of Section 10(a), 33 U.S.C. §910(a), is proper pursuant to *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and awarded benefits based on an average weekly wage of \$1,004.37. Decision and Order at 14. The administrative law judge subsequently denied claimant's motion for reconsideration.³ Employer appeals the administrative law judge's Decision and Order. The Longshore Claims Association (LCA) filed an *amicus curiae* brief in support of employer's position. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

Total Disability Benefits During Vocational Rehabilitation

Employer contends the administrative law judge erred in awarding claimant total disability benefits during his retraining period. Its arguments are three-fold. First, employer argues that the decision in *Abbott*, issued by the United States Court of Appeals for the Fifth Circuit, runs afoul of the Act and should not be followed in this case arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Next, employer argues that if *Abbott* is good law, it does not apply to the facts of this case. Finally, it asserts it was denied due process because of the district director's failure to transfer the case to the Office of Administrative Law Judges (OALJ) for a

³ He stated that claimant's request to extend the award of total disability benefits to December 2002 would be better addressed in a motion for modification, as there were no documents before him to verify the need for the change.

hearing on whether claimant was entitled to vocational rehabilitation, as it objected to the program from the outset. The LCA also argues that *Abbott* is not good law and should not be followed. Claimant disagrees, and he argues that *Abbott* comports with the provisions and the intent of the Act, that neither the Act nor any other statute or constitutional right is violated, and that the evidence of record supports the administrative law judge's award of total disability benefits during the rehabilitation program. The Director agrees with claimant's position.

Applicability of *Abbott*

Employer first argues that the Fifth Circuit's decision in *Abbott* should be rejected as being contrary to the Act. The LCA agrees, citing legislative history which it asserts shows that congress did not intend for the award of total disability benefits during rehabilitation where suitable employment is otherwise available. Claimant asserts that application of the principles espoused in *Abbott* accord with the policy for awarding total disability benefits established in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), and with the Act's goal of promoting the rehabilitation of injured employees. See also *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The Director argues that *Abbott* is good law and should be followed and that his interpretation of the Act and the regulations is due deference, as it is reasonable and has been followed consistently by the Board and the two courts that have addressed the issue.

In *Abbott*, the claimant injured his back on January 11, 1983. Ultimately, his doctor recommended vocational retraining. In the fall of 1985, Abbott began a four-year college program. The Department of Labor (DOL) paid his tuition and contractually required him to attend school full-time throughout the year and to maintain a certain minimum grade point average. Abbott completed the program, plus a one-year internship, in July 1990, and he began work as a medical technician at a public hospital. From the date of Abbott's injury until its carrier became insolvent on September 15, 1986, the employer voluntarily paid compensation to the claimant and did not object to his rehabilitation program. When the employer sought payment of claimant's compensation from Louisiana Insurance Guaranty Association (LIGA), LIGA objected to the payment of total disability benefits while Abbott was enrolled in a retraining program, asserting that the availability of suitable alternate employment had been established. The administrative law judge ultimately awarded temporary and permanent total disability benefits until Abbott completed his retraining program, and the Board affirmed the decision. *Abbott*, 27 BRBS 192. In affirming the administrative law judge's decision in *Abbott*, the Board adopted the administrative law judge's reasoning that, although Abbott could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehabilitation program prevented him from working. Specifically, in light of *Turner*, 661 F.2d at 1037-1038, 14 BRBS at 160) the Board stated:

the degree of disability is determined not only on the basis of physical condition, but also on factors

such as age, education, employment history, rehabilitative potential, and the availability of work that claimant can perform.

Abbott, 27 BRBS at 202.

In affirming the Board's decision, the Fifth Circuit acknowledged that the Act does not specifically provide for total disability benefits during periods of rehabilitation, but, following the Board's rationale, it also determined that the award was consistent with its holding in *Turner*, 661 F.2d 1031, 14 BRBS 156. That is, the jobs identified by the employer were not "available" to Abbott because his participation in the DOL-sponsored plan precluded him from working. As the jobs were "unavailable," the employer did not establish the availability of suitable alternate employment, and Abbott was entitled to total disability benefits until the completion of the program when jobs would become "available." *Abbott*, 40 F.3d at 124-125, 127-128, 29 BRBS at 23-24, 26-27(CRT).

The Board has consistently applied *Abbott* in cases arising both within and outside the Fifth Circuit to determine whether the claimants were entitled to total disability benefits during periods of vocational retraining. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001) (Ninth Circuit); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000) (Fourth Circuit); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (Fourth Circuit); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998) (Fifth Circuit); *Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994) (Ninth Circuit). Additionally, a recent decision of the United States Court of Appeals for the Fourth Circuit further supports the validity of *Abbott* and its progeny. *Newport News Shipbuilding &*

Dry Dock Co. v. Director, OWCP [Brickhouse], 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

In *Brickhouse*, claimant suffered a back injury. Unable to return to his usual work, he began a rehabilitation program in graphic communications. With only two classes remaining, in the last semester of the program, Brickhouse's former employer offered him alternate employment at its facility. The administrative law judge found, and the Board and the court affirmed, that Brickhouse's participation in the rehabilitation program precluded his acceptance of the employer's offer. Although the final courses may have been offered at night in the spring and summer semesters of 1997, the Board held that Brickhouse could not have completed his training within the time allotted by OWCP, that is by May 15, 1997, if he had taken the job; thus, the proffered employment was not available. *Brickhouse v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 98-1164, 00-520 (Feb. 6, 2001). Additionally, the Board held that *Abbott* applies even if rehabilitation does not necessarily result in an increased wage-earning capacity. The Fourth Circuit discussed *Abbott* and the Board's decision in *Gregory*, 32 BRBS 264, wherein the Board articulated factors to consider in awarding total disability benefits during vocational rehabilitation, and concluded, in agreement with the Director's position, that an increase in a claimant's wage-earning capacity is but one of several factors that must be considered and, alone, is not dispositive of a claimant's entitlement to total disability benefits during rehabilitation. Further, the court held that, considering all the relevant factors, Brickhouse had established that suitable alternate employment was unavailable to him while he

was enrolled in his retraining program.³ *Brickhouse*, 315 F.3d at 293-296, 36 BRBS at 91-92(CRT).

Despite the consistent application of *Abbott* to permit an award of benefits where claimant is unable to work during vocational rehabilitation, employer now challenges such awards on the basis that there is no specific provision in the Act allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. Further, it asserts, while the regulations provide the framework for DOL to develop vocational retraining programs, they do not provide for total disability awards for the duration of such programs. As neither the Act nor the regulations mention such awards, employer, citing statutory construction cases, asserts that no such awards are permitted. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992) (use the language of the Act to interpret its meaning and go beyond that language only in extraordinary circumstances); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) (use plain language if it is clear). The LCA expounds on employer's argument by showing that Congress considered and rejected the idea of awarding total disability benefits during periods of vocational rehabilitation. In June 1980, the House of Representatives considered a bill that stated: "an employee . . . shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation." H.R. 7610, 96th Cong. (June 18,

³ The Fourth Circuit also stated that the administrative law judge was entitled to conclude it was unreasonable for the employer to compel *Brickhouse* to choose between the job and completing his training. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 92(CRT).

1980). In July 1982, a bill before the Senate omitted the phrase "be entitled to" from the wording above. Sen. Rpt. 97-498 at 58 (July 19, 1982). By 1984, when the amendments to the Act were passed, these proposed amendments had been eliminated. As a result, no specific language on disability during rehabilitation is included in the Act as it exists today. Consequently, the LCA argues that the Fifth Circuit's decision in *Abbott* effectively re-inserts the provision that was discussed and rejected by Congress.⁴ As claimant counters, however, *Abbott* requires consideration of a number of factors; thus, entitlement to benefits is not automatic, as it would have been under the proposed amendments. The Director states that *Abbott* is in full compliance with the Act and the regulations and, rather than creating a new type of benefit, it merely adds another factor for the administrative law judge to consider when addressing the issue of the availability of suitable alternate employment.

We agree with claimant and the Director. The holding in *Abbott* rests, not on any novel legal concept, but on the well-established principle that, once claimant establishes a *prima facie* case of total disability, employer bears the burden of demonstrating the availability of suitable alternate employment. See, e.g., *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156. If

⁴ Employer has filed a supplemental brief, citing *A-Z Int'l v. Phillips*, 323 F.3d 1141 (9th Cir. 2003) (plain language of the Act limits remedy for the filing of fraudulent claim to that provided in Section 31, 33 U.S.C. §931). Employer contends that, in view of Congress' rejection of the proposed amendment and of the silence in Section 39, 33 U.S.C. §939, and its implementing regulations, 20 C.F.R. §702.501 *et seq.*, regarding the payment of total disability benefits during vocational rehabilitation, such awards are precluded.

employer makes this showing, claimant may nonetheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. See, e.g., *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Moreover, claimant is entitled to total disability until the date suitable alternate employment is available. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment. Although Congress considered and rejected awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right, the failure to enact that proposal does not establish that *Abbott* runs counter to congressional intent. Entitlement to benefits during enrollment in a vocational rehabilitation program under *Abbott* is not automatic but depends on an analysis of various factors relevant to ascertaining whether employment is reasonably available. As the Director states, *Abbott* does not create a new type of award but permits consideration of factors relevant to claimant's employability consistent with existing case law.

In this respect, the *Abbott* case is like many others expounding upon and defining appropriate tests for application of the statute. For example, nominal awards are not specifically mentioned in the Act, and they extend the time frame for filing Section 22, 33 U.S.C. §922, motions for modification, but they have found favor in the courts as a rational interpretation of Section 8, 33 U.S.C. §908. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521

U.S. 121, 31 BRBS 54(CRT) (1997).⁵ Similarly, in construing Section 8(f), 33 U.S.C. §908(f), the courts adopted a "manifest" requirement for an employer to receive relief under that section from continuing liability for compensation even though this requirement is not explicitly contained in the statute. See, e.g., *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1999); *Duluth, Missabe & Iron Range Ry. Co. v. Department of Labor*, 553 F.2d 1144; 5 BRBS 756 (8th Cir. 1977); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

With regard to disability, it was left to the courts to develop criteria for demonstrating "total" and "partial" disability, and the tests created establish that the degree of disability is measured by considering economic factors

⁵ In a supplemental brief, the LCA asserts that *Rambo II* is distinguishable because Congress had not spoken on the matter of *de minimis* awards previously; therefore, it was reasonable for the courts to accept the Director's interpretation. However, it argues, the matter of total disability benefits during vocational rehabilitation had been addressed and rejected, and there is no need to look beyond the Act for Congress' intent in this regard. We disagree. While Congress did not enact the proposed automatic award of total disability benefits during vocational rehabilitation, there is nothing in the statute prohibiting total disability awards during periods of rehabilitation in appropriate circumstances, based on a number of factors consistent with case law. Similarly, we reject employer's reliance on *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003). Contrary to employer's assertion, *Ibos* does not invalidate *Abbott*. In *Ibos*, the court refused to expand the credit doctrine beyond the confines of Section 3(e), 33 U.S.C. §903(e), in order to allow an employer to offset its total liability against the claimant's settlement proceeds with prior employers. Here, there is no creation of a new award. Rather, the issue is only whether an employer has satisfied its burden of establishing the availability of suitable alternate employment under existing precedent.

in addition to an injured employee's physical condition. See 33 U.S.C. §908; *Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Godfrey v. Henderson*, 222 F.2d 845 (5th Cir. 1955). Just as the courts and the Board have analyzed these issues, they have analyzed the issue of entitlement to total disability benefits during vocational rehabilitation and found, consistent with the Director's interpretation, that the *Abbott* solution is reasonable within the framework of suitable alternate employment law. *Brickhouse*, 315 F.3d at 292-296; 36 BRBS at 91(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Brown*, 34 BRBS 195; *Kee*, 33 BRBS 221; *Gregory*, 32 BRBS 264; *Bush*, 32 BRBS 213; *Anderson*, 28 BRBS 290; *Abbott*, 27 BRBS 192. Specifically, if a claimant's rehabilitation agreement with OWCP prohibits him from extracurricular employment, or if the administrative law judge determines that the rehabilitation schedule prevents such employment; then employment is "unavailable" to the claimant. If employment is not available, even if it is otherwise suitable for the claimant, then the employer has not satisfied its burden, and the claimant is entitled to total disability benefits until the date alternate employment becomes available. *Id.*; *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. Therefore, we reject employer's contention that *Abbott* is an invalid extension of the law, and we affirm the administrative law judge's application of it to this case arising in the Ninth Circuit.

Claimant's Entitlement Under Abbott

Employer next asserts that, even if application of *Abbott* is proper, claimant is not entitled to total disability benefits because he has not established that his vocational rehabilitation program precluded employment. Claimant and the Director disagree. They argue that the administrative law judge correctly considered all relevant factors and reached a reasonable conclusion supported by substantial evidence. In its decision in *Gregory*, 32 BRBS 264, the Board discussed relevant factors under *Abbott*, stating that the fact-finder should consider: whether the employer agreed to the rehabilitation plan and the continuing payment of benefits; whether the claimant's enrollment in the plan precluded employment; whether the completion of the program would result in an increased wage-earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability; and whether the claimant showed full diligence in completing the program.⁶ *Gregory*, 32 BRBS at 266; see also *Bush*, 32

⁶ The Director suggests that a refinement of the criteria for ascertaining whether a claimant is entitled to total disability benefits while enrolled in a vocational rehabilitation program is necessary as some factors may impinge on the discretion of the Secretary in determining the claimant's entitlement to vocational rehabilitation. See discussion *infra*. We do not believe it is necessary to do so. The administrative law judge's role does not involve reviewing the implementation of the rehabilitation plan or a claimant's entitlement to rehabilitation services, but rather he assesses the effect of the plan on the claimant's employability during its implementation. The criteria identified in *Gregory* were developed from the facts supporting the award in *Abbott* and do not comprise a complete or inflexible standard. *Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT) ("the guiding legal principles require consideration of a wide range of the relevant factors in reaching the proper result in each case."). The whole body of law which has evolved since *Abbott* establishes that no one factor is dispositive of entitlement; thus the factors of concern to the Director, i.e., whether employer approved the plan or it

(Continued on following page)

BRBS at 219. Employer argues that consideration of these factors results in the conclusion that claimant has not established entitlement to total disability benefits pursuant to *Abbott*.

First, employer argues it did not approve of the rehabilitation plan. It asserts it established the availability of suitable alternate employment claimant could perform without resort to rehabilitative training. The administrative law judge found that employer's disapproval of the program is relevant, but it is not dispositive. Decision and Order at 12. Next, employer asserts that claimant's enrollment in the rehabilitation plan did not preclude employment. To the contrary, it states, claimant's plan required him to seek internships – paid or unpaid – and to work 700 hours. Cl. Exs. 5, 7. As classes were not offered every quarter, employer asserts claimant had ample time to work but had no real motivation to do so. Moreover, claimant secured an internship which paid \$7.75 per hour, and he worked approximately 80 hours before giving it up. Tr. at 46. The administrative law judge found that claimant showed that his enrollment effectively precluded other employment as he credited claimant's testimony regarding the hours dedicated to the retraining program: commuting (approximately 20 hours per week);⁷

is reasonable, are not dispositive. See *Brickhouse*, 315 F.3d 286, 36 BRBS at 91(CRT) (*Abbott* may be applied even if rehabilitation does not increase post-injury wage-earning capacity); *Brown*, 34 BRBS 195 (*Abbott* award may be made even if injury was to a scheduled member); *Bush*, 32 BRBS 213 (factual differences with *Abbott* do not make it inapplicable).

⁷ Claimant lives on Bainbridge Island in Washington state, and he must take a ferry and a bus to get to school. His commuting time varies from 1.5 hours to 2.25 hours each way. Decision and Order at 7; Tr. at 80.

studying (approximately 25 hours per week); and attending class (15-18 hours per week). *Id.* Further, the administrative law judge credited Ms. Williams, claimant's initial vocational counselor, who testified that claimant's intellectual capacity, in addition to his long commute, would cause claimant difficulty in trying to combine work and school. *Id.*; Cl. Ex. 21. He then gave claimant credit for attempting to secure work, both before entering the rehabilitation program and during, and he found that, contrary to employer's view, claimant's inability to retain the paid internship is proof of his inability to work and attend school at the same time. Decision and Order at 12.

Employer also argues that the evidence establishes that claimant's enrollment in the program would not increase his wage-earning capacity. Rather, it posits he would earn more per year if he obtained one of the jobs identified in the labor market surveys than if he completed the rehabilitation plan. Thus, employer argues that retraining was unnecessary. The administrative law judge based his conclusions on the opinions of claimant and his vocational advisors and found that enrollment in the program was best for claimant's long-term earning potential, and that starting wages in hotel management were comparable to or less than the wages of some of the jobs identified by employer but, depending upon training, experience, and hotel, could exceed \$27,580 or \$30,000. Decision and Order at 13. Finally, employer contends claimant did not demonstrate due diligence in completing his program, as there were multiple delays both at the outset and during the training. Employer thus contends it should not be liable for total disability benefits during claimant's retraining period. The administrative law judge found that claimant was enrolled in the program without

significant interruption since 1999 and was scheduled to complete it in June 2002. Decision and Order at 13. Accordingly, the administrative law judge awarded claimant total disability benefits for the duration of the training program, ceasing June 7, 2002. Decision and Order at 13.

We find employer's arguments unpersuasive. The administrative law judge clearly considered all of the relevant factors and reached a rational conclusion. Decision and Order at 12-13; *see also Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT). Although it is true employer opposed the program and there was no contractual requirement that claimant refrain from outside employment, the contract with OWCP did require claimant to attend school on a full-time basis. Further, the administrative law judge found that claimant demonstrated that the time needed for commuting, his classes, and his studies effectively prohibited outside employment unless claimant were to exhaust himself. The Board has previously affirmed a finding that outside employment was precluded on a similar rationale. *See Brown*, 34 BRBS at 198-199. As an internship was a required part of claimant's program, and, according to claimant, a paid internship was rare, it was reasonable for the administrative law judge to interpret claimant's resignation of such a position, absent evidence of any other reason, as evidence that he could not complete his schooling and work at the same time. Moreover, although the evidence establishes that claimant would have had a post-injury wage-earning capacity without any vocational rehabilitation, evidence of an eventual increased wage-earning capacity is not mandatory for an award, under *Abbott. Brickhouse*, 315 F.3d at 295-296, 36 BRBS at 91(CRT). Nevertheless, the administrative law judge reasonably credited the testimony of

claimant and his initial counselor that retraining would help increase claimant's longterm earning potential. See *id.*; Brown 34 BRBS at 198-199. Therefore, we affirm the administrative law judge's determination, after evaluation of the relevant criteria, that claimant is entitled to total disability benefits during his vocational rehabilitation. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 91-92(CRT); *Abbott*, 40 F.3d at 124-128, 29 BRBS. at 23-27(CRT); *Brown*, 34 BRBS at 198-199; *Bush*, 32 BRBS at 218-219.

Due Process

Employer next argues it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation and whether it is liable for total disability benefits for that period. It asserts that, upon its request, the case should have been transferred to the OALJ for a hearing on this issue, citing *Ingalls Shipbuilding, Inc., v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996). Employer maintains that failing to transfer this case for a hearing and allowing the vocational counselor, who is not an administrative law judge, to determine the appropriateness of vocational rehabilitation violates not only the Longshore Act, 33 U.S.C. §§919, 939, but also the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, and the Fifth and Fourteenth Amendments of the Constitution, U.S. Const. amend. V, XIV, depriving employer of its due process rights by taking property without a hearing. The administrative law judge did not address these issues. As no fact-finding is involved, we shall address them.

First, while the Act grants "aggrieved parties" the right to a hearing, 33 U.S.C. §919(c), (d); *Boone*, 102 F.3d

1385, 31 BRBS 1(CRT), an evidentiary hearing before an administrative law judge is not necessarily required on all contested issues. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that purely legal disputes, or those disputes that do not require fact-finding, are not within the jurisdiction of the OALJ, and, therefore, do not require an evidentiary hearing. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), cert. denied, 531 U.S. 956 (2000);⁸ see also *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988) (no need for hearing where sole issue concerned legal question of employer's ability to withdraw from settlement after claimant's death); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring) (OALJ has no jurisdiction over district director authority to change the claimant's treating physician under Section 7(b)); *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991) (district director's denial of rehabilitation services was properly appealed to the Board); *McGrady v. Stevedoring Services of America*, 23 BRBS 106 (1989) (district director's decision regarding propriety of Section 14(f) penalty properly before the Board); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989) (within the district director's discretion to determine whether the Special Fund is liable for the claimant's vocational rehabilitation

⁸ Although it noted that the United States Court of Appeals for the Seventh Circuit has held that parties have an absolute right to a hearing in all contested cases, *Pearce v. Director, OWCP*, 647 F.2d 713, 13 BRBS 241 (7th Cir. 1981), the Ninth Circuit specifically disagreed with the Seventh Circuit's rationale and stated that "*Pearce* has not been followed or cited favorably by any other court." *Cabral*, 201 F.3d at 1096, 33 BRBS at 214(CRT).

expenses). In *Cabral*, the court specifically held that as disputes regarding the amount of an attorney's fee award are within the sole discretion, of the district directors, they do not require an evidentiary hearing. In such cases where an evidentiary hearing is not necessary, review of the district director's determination is best effectuated through appeal to the Board.

In this case, the issue employer sought to bring before an administrative law judge involved whether claimant was entitled to vocational rehabilitation. Section 39(c)(1)-(2) of the Act, 33 U.S.C. §939(c)(1)-(2) (emphasis added), addresses vocational rehabilitation and states in relevant part:

(c)(1) *The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.*

(2) *The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation . . . where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund*

provided for in Section 44 in such amounts as may be necessary to procure such services. . . .

Where statutory authority is placed in "the Secretary," that authority is wielded by the district directors, as the Secretary's discretionary authority has been delegated to those officials. 20 C.F.R. §§701.201, 701.202, 701.301(a), (6), (7). See *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 351 (1994) (McGranery, J., dissenting).

The implementing regulations set forth the procedures by which an injured employee may obtain vocational rehabilitation or retraining. 20 C.F.R. §§702.501 *et seq.* Section 702.501 states that the purpose of such retraining is to return permanently disabled persons to gainful employment. 20 C.F.R. §702.501. Section 702.502 provides that the district director or a member of his staff shall promptly refer an eligible claimant to the vocational rehabilitation advisor, and Sections 702.503-702.506 set forth the advisor's responsibilities with regard to the claimant's rehabilitation, from screening the claimant to developing the training program to monitoring the claimant's progress. 20 C.F.R. §§702.502-702.506. The regulations do not give employers a role in forming or approving vocational rehabilitation programs. *Id.* Because Section 39(c)(2) and its implementing regulation grant the authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. *Olsen*, 25 BRBS at 171 n.3; *Cooper*, 22 BRBS at 40-41. Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not

within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits.⁹ *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT); *Cooper*, 22 BRBS at 40-41. Accordingly, contrary to employer's argument, neither the Act nor the APA, which does not come into effect, has been violated. We, therefore, reject employer's argument that it was deprived of due process because the case was not transferred to the OALJ upon its request.

We also reject employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue: As Director points out, employer confuses its rights and obligations concerning two distinctly different decisions which the Act reserves to separate decision makers. This appeal stems from an evidentiary hearing before an administrative law judge on the issue of claimant's entitlement to disability benefits. Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits. See *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). With regard to implementation of claimant's vocational rehabilitation plan, Director concedes that employer is entitled

⁹ Thus, employer's remedy if it disagreed with the district director's decision regarding rehabilitation was appeal to the Board for review under an abuse of discretion standard. *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT). That this could result in the bifurcation of the case is an insufficient basis to ignore the statutory scheme giving exclusive authority to the Secretary and the district directors. See *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 353-354 (1994) (McGranery, J., dissenting).

notice and an opportunity to comment prior to implementation of the plan, noting that employer received ample notice and opportunity to comment. Moreover, employer could have filed a direct appeal to the Board if it believed the district director abused his discretion under the Act and regulation. See *Cabral*, 201 F.3d at 1095, 33 BRBS at 213(CRT); *Cooper*, 22 BRBS at 40-41. Under Section 39(c)(2), the costs of vocational rehabilitation are payable from the Special Fund.¹⁰ Congress has set forth the vocational rehabilitation process, and the district director and the administrative law judge in this case followed the proper procedures with regard to claimant's rehabilitative services. 33 U.S.C. §939(c); 20 C.F.R. §702.501 *et seq.*

Average Weekly Wage

Employer also contends the administrative law judge misinterpreted *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and erred in computing claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a). Specifically, employer argues that *Matulic* is distinguishable from the case herein, that use of Section 10(a) results in benefits based on an unfounded increase of \$12,000 over claimant's historical earnings and that Section 10(c), 33 U.S.C. §910(c), should be used to compute claimant's average weekly wage.¹¹ The LCA

¹⁰ To the extent that employer seeks a hearing prior to the imposition of liability for benefits, we note that pre-deprivation hearings are not available under the Act. *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000).

¹¹ Employer divides claimant's earnings for 1998, \$39,345.80, by 52 to reach an average weekly wage of \$756.65; however, employer's calculation fails to include some wages from 1997 which would complete the 52-week period.

argues that previous Ninth Circuit cases show that the court did not establish a hard and fast rule in *Matulic* but, rather, sought to implement a standard that would be fair based on the facts of the case. That is, use of Section 10(a) is presumed but can be rebutted based on the facts of each particular case, although rebuttal cannot be based solely on the number of days worked. Citing *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), and *Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74 (9th Cir. 1932), the LCA argues that Ninth Circuit precedent supports finding an average weekly wage that represents the claimant's true lost earning capacity and not one that ignores his earning history. Claimant interprets *Matulic* as establishing a "clear bright line" for defining "substantially the whole of the year." He asserts that, because his number of workdays surpassed the *Matulic* 75 percent mark, he is presumptively entitled to a computation of his average weekly award under Section 10(a). The Director concurs.

Section 10(a) of the Act, 33 U.S.C. §910(a) (emphasis added), states:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during *substantially the whole of the year* immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

The Board has held that 42 weeks is "substantially the whole of the year," *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981), but that 33 weeks is not, *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). Because the term is undefined, the Ninth Circuit addressed where the line should be drawn in *Matulic*.

In *Matulic*, the administrative law judge found that the claimant actually earned \$43,370.81 in the year preceding his injury and that use of Section 10(a) would result in calculated earnings of \$52,941.20; thus, he concluded that Section 10(a) could not be used because it would overestimate the claimant's annual earnings. On appeal, the Ninth Circuit held that under the statutory framework, Section 10(a) must be used in calculating average weekly wage unless to do so would be unreasonable or unfair. *Matulic*, 154 F.3d. at 1057, 32 BRBS at 150-151(CRT); see 33 U.S.C. §910(c).¹² Based on this congressional mandate, the Ninth Circuit held that "mere" overpayment due to the application of Section 10(a) is not unreasonable or unfair but is built into the system. *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT); see also *Duncanson-Harrelson*, 686 F.2d at 1342. After discussing its decision in *Duncanson-Harrelson*,¹³ the court concluded:

¹² Section 10(c) applies "[i]f either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . ."

¹³ The Ninth Circuit affirmed the use of Section 10(c) in *Duncanson-Harrelson* because use of Section 10(a), while technically proper in that the claimant worked substantially the whole of the year, would result in overcompensation as claimant was a seasonal worker and would be compensated for working 65 more days than he actually

(Continued on following page)

"when a claimant works more than 75% of the workdays of the measuring year the presumption that §910(a) applies is not rebutted."¹⁴ *Id.*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, because Matulic worked 82 percent of the days and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied Section 10(a). *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

The Board followed *Matulic* in *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), appeal pending No. 02-71207 (9th Cir.). In *Price*, the administrative law judge found that the claimant's employment was stable and continuous. During the 52 weeks preceding his injury, Price worked 197 days of the possible 260. The administrative law judge found that this number of days worked

worked. *Duncanson-Harrelson*, 686 F.2d at 142-143. In *Marshall*, the Ninth Circuit determined that it was improper to use Section 10(b), 33 U.S.C. § 910(b), to determine the claimant's average weekly wage when the similarly-situated worker worked over 100 days more than did the claimant during the work year. *Marshall*, 56 F.2d at 75-76, 78. The court noted that the claimants in both *Duncanson-Harrelson* (75%) and *Marshall* (61%) worked substantially fewer of the workdays than did Matulic (82%). *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT). Relying on the statement in *Duncanson-Harrelson* that the point at which the disparity between claimant's actual days of work and the 260-day standard becomes unreasonable is "a question of line-drawing," the court drew the line where *Duncan-Harrelson* left it, i.e., at more than 75 percent of work days.

¹⁴ The court noted that in *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), the Seventh Circuit applied Section 10(c) where a claimant worked 84 percent of the workdays. The Ninth Circuit felt that a line drawn at 84 percent was too rigid and stated: "We do not believe such a rigid rule is consistent with the intent or purpose of the Act." *Matulic*, 154 F.3d at 1058 n.4, 32 BRBS at 151n.4(CRT). In *Strand*, moreover, the court relied on the fact that claimant was a seasonal worker in holding Section 10(c) applies.

equated to 75.7 percent and required application of Section 10(a) pursuant to *Matulic*. Price, 36 BRBS at 62. The Board affirmed the administrative law judge's conclusion, holding that *Matulic* set the threshold for application of Section 10(a) at 75 percent, and Price met that level. *Id.*

The administrative law judge herein found that claimant earned \$38,422.57 in 1995, \$38,571.33 in 1996, \$39,648.34 in 1997, and \$39,717.62 in 1998. In the 52 weeks prior to the injury, he found that claimant earned a total of \$40,466 by working 1,611 hours or 201.35 days,¹⁵ which amounts to 77.4 percent of the 260-day standard work year for a five-day per week worker. Decision and Order at 9, 14; Cl. Exs. 2-3. Thus, pursuant to *Matulic*, the administrative law judge applied Section 10(a) and found that claimant's average weekly wage was \$1,004.37, resulting in a compensation rate of \$669.38. Decision and Order at 14. He rejected employer's assertion that the presumptive use of Section 10(a) is rebutted because the calculated earnings exceed claimant's actual earnings by \$12,000.¹⁶ As the Ninth Circuit stated in *Matulic* that

¹⁵ It appears either claimant or the administrative law judge divided the number of hours claimant worked by 8 in order to arrive at 201.35 days. The Board has affirmed this as a rational method of arriving at the number of days worked, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). But see *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999) (decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000) (dividing vacation hours by 8 to convert them to workdays is irrational because it would mean the claimant worked more than the allotted 260 days per year for a 5-day-per-week worker).

¹⁶ Multiplying \$1,004.37 by 52 weeks results in calculated earnings of over \$52,000 per year, and claimant's actual annual earnings for each of the three years preceding his injury did not exceed approximately \$40,000.

overcompensation alone is insufficient reason to rebut the use of Section 10(a), and as that is the only reason employer offers here, we must affirm the administrative law judge's use of Section 10(a). The instant situation, like that in *Price*, satisfies the test set forth in *Matulic* and, consequently, "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

CERTIFICATE OF SERVICE

02-0783 Robert Castro v. General Construction Company,
Liberty Northwest Insurance Corporation, Direc-
tor, Office of Workers' Compensation Programs,
Longshore Claims Association (Case No. 01-
LHCA-0515) (OWCP No. 14-0129450)

I certify that the parties below were served this day.

May 13, 2003
(DATE)

/s/ S. Rimahi for
Thomas O. Shepherd, Jr.
Clerk of the Board

Nicole E. Hanousek, Esq.
Law Office of
William D. Hochberg
222 Third Avenue North
EDMONDS, WA 98020

-Certified

Robert Castro
15750 Euclid Avenue
BAINBRIDGE ISLAND, WA
98110

-Certified

Raymond H. Warns, Jr., Esq.
Holmes Weddle & Barcott, P.C.
Wells Fargo Center
999 Third Avenue
Suite 2600
SEATTLE, WA 98104

-Certified

Roger A. Levy, Esq.
Laughlin, Falbo, Levy and
Moresi, L.L.P.
39 Drumm Street
SAN FRANCISCO, CA
94111

-Certified

Peter B. Silvain, Jr., Esq.
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue,
N.W.
Suite S-4325
WASHINGTON, DC 20210

-Certified

Ms. Karen P. Staats
District Director
OWCP-Longshore and
Harbor Workers'
Programs
1111 Third Avenue
Suite 620
SEATTLE, WA 98101

App. 62

Judge Richard K. Malamphy
U.S. Department of Labor
Office of Administrative Law
Judges
603 Pilot House Drive
Suite 300, Commerce Plaza
NEWPORT NEWS, VA 23606

U.S. Department of Labor
Office of Department of
Labor
Office of Administrative
Law Judges
111 Veterans Memorial
Blvd
Suite 530
METAIRIE, LA 70005

App. 63

U.S. Department of Labor Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099 [SEAL]

(757) 873-3634 (FAX)

Issue date: 08May2002

Case No: 2001-LHC-0515

OWCP No: 14-129450

In the Matter of:

ROBERT CASTRO,
Claimant,

v.

**GENERAL CONSTRUCTION COMPANY/
LIBERTY NW INSURANCE COMPANY,**
Employer/Carrier.

Appearances:

Nicole A. Hanousek, Esq.
For Claimant

Raymond H. Warns, Jr., Esq.
For Employer

Before: RICHARD K. MALAMPHY,
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Robert Castro ("Claimant") against General Construction Company ("Employer") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 *et seq.*

Claimant seeks permanent partial disability benefits based on an alleged thirty-five percent disability to his knee. In addition, Claimant seeks temporary or permanent total disability benefits¹ until the completion of his vocational rehabilitation on June 7, 2002.² Employer contends that Claimant was entitled only to a seventeen percent disability rating, which has been paid; that Employer has shown that suitable alternative employment was available to Claimant throughout the relevant period; and that Claimant is not entitled to benefits while enrolled in the vocational program.

A formal hearing in this case was held before me in Seattle, Washington on June 20, 2001, at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulations. Claimant offered exhibits CX 1-21.³ Employer offered exhibits EX 1-13. Claimant objected to EX 3, EX 12, EX 13, and EX 14. All were received into evidence over the objections (Tr. 18, 29). After the hearing, Claimant submitted CX 22, which is now received into evidence.

¹ Claimant stated that he was seeking temporary total disability benefits pursuant to *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1992). However, because he has reached maximum medical improvement as of August 14, 2000 (Tr. 10), any benefits that are awarded after that date should be classified as permanent total disability benefits.

² Claimant's pre-hearing statement requests benefits until July 1, 2002, but his vocational records indicate that the program will end on June 7, 2002 (CX 5, p. 84).

³ The following are references to the record:

CX - Claimant's exhibit

EX - Employer's exhibit

Tr. - Transcript of hearing

Claimant also requested permission to re-depose Dr. Schuster in rebuttal to Dr. Bradley's testimony. I granted the request and I now receive the deposition as CX 23.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to and I find as follows:

1. That the parties are subject to the act;
2. That Claimant suffered an injury in the course and scope of employment on November 20, 1998;
3. That the act applies to this case;
4. That Claimant has received certain periods of disability compensation which total \$49,935.26;
5. That Claimant filed a timely claim for compensation;
6. That Claimant gave timely notice of injury

(Tr. 5).

ISSUES

1. What is the correct disability rating for Claimant's knee injury?
2. Is Claimant entitled to total disability compensation while enrolled in a vocational rehabilitation program?
3. What is the appropriate average weekly wage?

FINDINGS OF FACT

Claimant, who is fifty-one years old, worked as a carpenter and pile driver from 1973 until he was disabled due to his injury (Tr. 30-31). He began to work for General Construction in 1998 as a pile driver (Tr. 30). His duties included chipping concrete piles, which often required him to hold a fifty-pound jackhammer in a horizontal position (Tr. 31). On November 20, 1998, Claimant injured his right knee when he slipped on a crane step (Tr.32-3).

The next day, Claimant sought medical care at the emergency room of Swedish Hospital (Tr. 33). The following week, he saw Dr. Lance Brigham, who determined that Claimant had torn his anterior cruciate ligament (ACL) (Tr. 34). On December 30, 1998, Claimant underwent his first surgery, an ACL reconstruction with a patellar tendon graft and iliotibial band tenodesis (EX 6, pp. 11-12). This surgery involved placing screws in Claimants knee (Tr. 34). After this surgery, Claimant experienced pain and swelling, which required him to use a brace, place ice on his knee, and take pain pills (Tr. 35).

Claimant believed that he and Dr. Brigham were not communicating well regarding his treatment, and on January 27, 1999, Claimant changed his treating physician to Dr. Peter Mandt (EX 7, p. 1; Tr. 36). The screws in Claimant's legs caused problems, and they were surgically removed on March 18, 1999 at Dr. Mandt's recommendation (EX 7, p. 2; Tr. 36-7). Dr. Mandt released Claimant to work on May 10, 1999 (EX 7, pp. 6-8). Claimant returned to work from June 14, 1999 until July 13, 1999, at which time Dr. Mandt placed him on light duty (EX 14, p. 3; EX 7; p. 9).

Dr. Bruce Bradley is a board-certified orthopedic surgeon (EX 16, pp. 4-5). He examined Claimant on August 25, 1999, at the request of Employer (EX 8, p. 5). Claimant indicated that his knee was stiff and swollen. He stated that he could not squat fully due to decreased flexion (EX 8, p. 5).

Dr. Bradley examined Claimant's knee and found that it lacked 9 degrees to full extension and that it flexed to 125 degrees (EX 8, p. 3; EX 16, pp. 12-3). Claimant's thigh circumference was 16- $\frac{1}{8}$ " on the right and 17- $\frac{1}{8}$ " on the left (EX 8, p. 3). Dr. Bradley concluded that Claimant's right knee condition was fixed and stable and assigned a 17 percent impairment rating to the right lower extremity. Dr. Bradley attributed the impairment to the November 28, 1998 work-related accident (EX 8, p. 5). Dr. Bradley examined Claimant again on April 28, 2001, and reached substantially the same conclusion, reaffirming the 17 percent impairment rating and the work-relatedness of the injury. At that time, Dr. Bradley opined that Claimant did not need any further formal treatment (EX 10, p. 5).⁴

Upon reviewing Claimant's job description as a pile buck, Dr. Bradley concluded that Claimant could not return to his former employment. Dr. Bradley determined that Claimant should lift twenty pounds frequently and fifty pounds occasionally, squat and climb occasionally, and not crawl at all. He also stated that Claimant should have a mild unprotected height restriction (EX 16, pp. 14-5).

⁴ In his deposition, Dr. Bradley stated that he now believes that proper application of the combined values charts, would produce a rating of 10 percent (EX 8, p. 33). However, Employer has already paid a 17 percent rating and argued for a 17 percent rating at the hearing or on brief (Tr. 7, Employer/Carrier's Post-Trial Brief, p.19).

Claimant returned to Dr. Brigham on March 21, 2000 for an independent medical evaluation. Dr. Brigham did not provide a disability rating but noted Dr. Bradley's disability rating of 17 percent. Dr. Brigham recommended further surgery and stated that this surgery would not increase Claimant's disability rating (CX 13, pp. 253-4).

On July 31, 2000, Claimant had a third surgery to increase his flexion and decrease scar tissue (Tr. 39). On August 14, 2000, Dr. Mandt indicated that Claimant's condition was fixed and stable and that he could return to light duty, indicating that he had reached the (maximum medical improvement (EX 7, p. 17; Tr. 10). Claimant attempted light duty work at General Construction, cutting metal plates with a torch while remaining seated (Tr. 40). However, the job duties proved to be too strenuous for him. The plates and torches were very heavy, and he had difficulty getting out of the way when plates were dropped. He was also unable to get onto a forklift or to "do any of the stuff that I was needed to do to get the jobs done without asking for help and people were starting to get annoyed with me" (Tr. 41). The job also required him to walk "a lot," which caused throbbing pain and swelling in his leg (Tr. 41). Dr. Mandt concluded that Claimant's job duties were not appropriate to his restrictions, and Employer did not offer any other light duty work (Tr. 42). On October 6, 2000, Dr. Mandt opined that Claimant could not return to his regular job in heavy construction and that he should pursue vocational retraining for light-duty work (EX 7, p. 18).

Dr. Gary Schuster examined Claimant on May 10, 2001, at the request of Claimant's attorneys (CX 20). Dr. Schuster is board certified in sports medicine and internal medicine. He is not an orthopedic surgeon (CX 20, p. 4).

Dr. Schuster measured Claimants knee flexion from negative 10 degrees to 126 degrees (CX 12, p. 250). Dr. Schuster measured Claimant's thigh at 12 centimeters above the knee. He found that Claimant's right knee measured at 41 centimeters and his left knee at 43 centimeters (CX 12, p. 250).

Using the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides)*, Dr. Schuster opined that Claimant's diminished range of motion in the right knee yielded a 20 percent lower extremity impairment. He found that unilateral thigh atrophy of 2.7 centimeters yielded a 12 percent lower extremity impairment. Finally, he felt that Claimant's post-surgery status represented a 7 percent lower extremity impairment. Dr. Schuster then used the combined values chart to arrive at a 35 percent permanent partial disability rating of the lower right extremity (CX 12, p. 251).

In a second deposition, Dr. Schuster testified that he has been using the *AMA Guides* to assign disability ratings several times a weeks since the 1980s (CX 23; p. 4). He stated that the *Guides* are standardized in order that "if Dr. X looks at a patient, they can get similar results to Dr. Y in Seattle versus Miami. And you get, you know, similar reliability of findings" (CX 23, p. 5). Upon reviewing *AMA Guides* Table 17-2, "Guide to the Appropriate Combination of Evaluation Methods," Dr. Schuster admitted that he had used the chart incorrectly in rendering his rating. According to the chart, values for diminished range of motion, muscle atrophy, and diagnosis-based impairments could not be combined (CX 23, pp. 22-3). Instead of combining the values, Box 17-1 in the *AMA Guides* instructs the physician to select the largest and most clinically appropriate methods for each illness/injury" (CX

23, ex 2). In this case the largest and most appropriate rating was 20 percent for diminished range of motion. Thus, Dr. Schuster acknowledged that, if the steps set out in the *AMA Guides* were applied to the measurements that he made of Claimant, Claimant's impairment rating would be 20 percent (CX 23, pp. 24-5).

However, Dr. Schuster pointed to language stating that "the evaluator should choose the impairment using different alternatives and choose the method or combination that clinically is most useful for the individual (CX 23, p. 27). He argued that it was appropriate to combine the atrophy and range of motion ratings, stating, "It's really up to me to say this can or can't be. This is what the text allows you to do" (CX 23, p. 27). He reasoned that, since combining the impairments yielded a higher rating, the combination was appropriate to achieve an "optimal" result (CX 23, p. 27). However, he stated that he would not include the diagnosis-based estimate. Therefore, his overall rating was reduced from 35 to 30 percent lower body impairment (CX 23, p. 29).

Dr. Mandt measured Claimants range of motion at 130 degrees in October 2000 (CX 19, p. 19). However, Dr. Mandt did not assign a disability rating based on this measurement. He testified that he does not consider it appropriate to assign disability ratings to his own patients. He did not rate Claimant's injury but he considered Dr. Bradley's rating and Dr. Schuster's rating both to fall within the acceptable range (CX 19, p. 16).

2. Vocational assessment

Liberty Northwest referred Claimant to Vocational Consulting, Inc. on September 24, 1999 (EX 3, p. 1).

Monte Ewald, a vocational rehabilitation consultant, conducted a labor-market survey. He identified thirteen positions that were available to Claimant. The following types of jobs were identified: alarm monitor, security guard; warehouse worker, and associate mailer (EX 3). The jobs were identified between December 28, 1999 and January 12, 2000 and paid between \$8.00 and \$10.00 per hour (EX 3, pp. 4-33). Claimant's treating physician, Dr. Mandt, approved the jobs (EX 3, pp. 34-9).

Kent Shafer, Employer's vocational expert, has a masters degree in rehabilitation counseling and is a principal and counselor with OSC Vocational Systems, inc. (Tr. 87). He has been performing vocational assessments and labor-market surveys in longshore cases for over eighteen years and has testified on behalf of employers and claimants (Tr. 88). Between June 2000 and April 2001, Shafer located ten jobs based on Claimants medical history, vocational skills, and educational history (EX 13, pp. 1-48). Dr. Bradley, Dr. Mandt, and Stan Owings all approved the jobs (EX 13, pp. 1-10; CX 19, pp. 28-9; CX 6, p. 172). However, Dr. Bradley stated that he only approved the security guard and night monitor positions on the condition that Claimant would not be required to physically confront or restrain anyone (EX 16, p. 67).

Most of the job's in Employers survey paid between \$8.00 and \$10.00 per hour, or between \$16,640 and \$20,800 over an eight-hour day in a 260-weekday year. Shafer indicated that the jobs have the potential with experience to pay Claimant around \$25,000 per year, but he did not identify specific "experienced" positions or assess their availability to Claimant (EX 13, p. 14). Information from the Bureau of Labor Statistics indicates that hotel/motel managers in Washington state make an

average of \$26,280 per year, \$27,580 in the Seattle area (EX 13, p. 14; CX 6, p. 173).

Shafer identified the following specific jobs: courier, cashier, night monitor, bench assembler, security officer, and production worker (EX 13, p. 15). At the hearing, Shafer testified that there is great demand for the jobs that he identified and that similar positions are always available in the Seattle labor market (Tr. 91, 101, 110).

Shafer stated that the function of most security guards is "simply [to] provide a presence." He referred to recent litigation in the area that occurred when a security officer chased and killed a suspect, stating that officers are generally prohibited from taking such action. Officers would stay in the lobby and periodically patrol the floor, functioning as a "walking monitor . . . interspersed with sitting between rounds." If a break-in or other security incident occurred, the officer would be expected to call the police. Security guards generally carry walkie talkies, and if the employee was "doing his job," Shafer could not foresee a situation in which the guard would not be able to contact the police for assistance (Tr. 93, 103).

Shafer testified that he believed Claimant could work nights while enrolled in school. However, he was not aware of Claimant's class schedule and was not aware until the hearing that attending school required Claimant to make a substantial commute (Tr. 109). Shafer stated that in the "ideal" situation, a student would not have to work while in school but that it was common for students to do so. He acknowledged that because of cognitive capacity and travel requirements, some people were not able to work while enrolled in school (Tr. 109). Shafer likes to meet with the individuals whose vocational status he is

assessing, but he was not able to meet with Claimant. He has not met with Ms. Williams, Dr. Mandt, or Dr. Bradley either (Tr. 96).

Claimant testified that he received labor-market surveys from Shafer (Tr. 48). Claimant followed up on the information in at least some cases, but he found that some of the jobs were taken (Tr. 49). In other situations, it would not have been worth taking the jobs because the commute was so far. He testified that "it didn't make sense to take a job that far out, because when I pay for the ferry and parking and commuting and everything, I would have wound up making two bucks an hour" (Tr. 49).

The OWCP referred Claimant to vocational counselor Carol Williams for OWCP sponsored vocational rehabilitation (CX 4 p. 73). Williams is a certified vocational counselor, certified mental health counselor in the state of Washington, and a certified case manager with the Commission on Rehab Counselor Certification and has Case Manager Certification. She is also a registered nurse with a four year degree in nursing and a public health certificate (CX 21, p. 5). She has been assisting injured workers since 1980. She recommends vocational retraining for some clients, but she has concluded that other clients did not need retraining (CX 21, p. 7). Williams followed her standard ~~procedure~~ with Claimant's case file, assessing his entire medical history, social and financial issues, vocational and educational training, work history and family social background (CX 21, p. 8). Her first meeting with Claimant took one and one-half hours. Dr. Mandt, Claimant's treating physician, was present (CX 21, p. 8).

Williams concluded that Claimant would benefit from vocational retraining. She noted that he was highly

motivated to return to the workforce and was anxious to find a job that would have the potential for increased earnings in the future. She also took into account the fact that the Claimant had attempted to return to construction in a light-duty capacity and had been unable to do so. Because Claimant's only training was in construction and he had no other work history, Williams concluded that vocational retraining was appropriate (CX 21, p. 18). Williams and Claimant considered rehabilitation options and chose hotel management by a "process of elimination (CX 21, pp. 19-20). Development of Claimant's plan began on August 13, 1999. With a few short interruptions, development and training of his vocational plans has continued and is projected to continue until June 7, 2002 (CX 5, p. 84).

Claimant enrolled in a hotel management program through Highline Community College (CX 4, p. 80). Claimant lives on Bainbridge Island and must take a ferry and a bus to get to school. His total commute takes "anywhere from two and a quarter hours to an hour and a half" each way (Tr. 80). He spends fifteen to eighteen hours per week in class and approximately twenty-five hours per week in study and preparation for his classes (Tr. 80). Claimant feels that he is "kind of slow" and needs to spend a good deal of time studying (Tr. 81).

Vocational Rehabilitation Services estimated that after completing the program Claimant could earn approximately \$16,000 per year at entry level (CX 6, p. 172). However, as he gained experience in the field, he could expect to earn an average wage of \$27,580 per year in the Seattle area (CX 6, p. 173). Williams testified that the "ultimate training goal" of the program was to attain assistant manager and manager positions, which would

pay between \$30,000 and \$40,000 per year at larger hotels (CX 21, p. 35).

The hotel management program includes an internship, which may be paid. However, Claimant stated that paid internships are "very rare." He was hired for a paid internship but he was not able to keep it. In order to complete the objectives for his program, Claimant had to resign the paid internship. He worked a total of eighty hours in the paid internship. He was supposed to be paid \$7.75 per hour, but at the time of the hearing he had been paid (Tr. 46).

Williams did not agree with the labor market survey provided by Shafer. She noted that Claimant's manual dexterity was limited by a previous hand surgery, which made it difficult to bend several of his fingers (CX 48). Reviewing the positions, Williams explained:

The cashier position was a temporary placement service and required frequent manual dexterity. The courier position was not an open position and required climbing steps, stairs. The bench assembly required manual dexterity. The cashier positions are unskilled positions and are generally part time and they tend to hire young people. The assembly positions require prolonged standing or prolonged sitting.

(CX 21, pp. 21-3).

Williams opined that Claimant "would have a great deal of difficulty" going to school and working at the same time. She stated that Claimant's intellectual abilities are such that he has to study longer than some other people have to study to accomplish the same goals (CX 21, p. 25). Furthermore, she testified that it would be difficult for Claimant to find a job that because of the length of his

commute and the need to accommodate his class and study schedule (CX 21, p. 25).

Williams retired at the end of 2000 and on January 29, 2001, Claimant began to see a new vocational consultant, Stan Owings. Owings concluded that Claimant was limited to jobs that required sedentary or light levels of physical exertion. Owings opined that the physically appropriate jobs available to Claimant based on his work and educational history were the lower skilled positions in the labor-force. Owings stated that the jobs identified by Shafer are "reasonable examples of jobs and wages currently available to Claimant" (CX 6, p. 172). Mr. Owings also recognizes that Claimant "may return to work with or without completing the educational curriculum in which he is currently enrolled" (CX 6, p. 175).

Claimant earned \$38,422.57 in 1995, \$38,571.33 in 1996 \$39,648.34 in 1997, and \$39,717.62 in 1998 (CX 2). Employer initially paid compensation to Claimant based on an average weekly wage of \$988.62 (CX 1, p.10). However, on July 3, 2000 Employer wrote a memo indicating that the average weekly wage had been adjusted to \$500.00 because Claimant had "not produced requested evidence of any earnings to supplement the \$9,886.18 earned at General Construction Company in the 52 weeks prior to the injury" (CX 1, p.11). On July 11, 2000, Employer reinstated compensation based on the "recalculated" average weekly wage of \$756.65 (CX 1, p. 13).

Claimant argued that his average weekly wage should actually be \$1006.60 (EX 15). In support of his motion for partial summary judgment, Claimant signed a declaration stating that he worked the following hours in 52 weeks prior to his accident:

App. 77

1997	MKB Construction	181 hours/22.6 days	\$ 4,108
1998	MKB Construction	994 hours/124.25 days	\$ 25,484
1998	General Construction	436 hours/54.5 days	\$ 10,874
total		1,611 hrs/201.35 days	\$ 40,466

These data are supported by wage records submitted by Claimant (CX 2, CX 3). The records also indicate that, in most of the weeks that Claimant worked, he worked forty hours (CX 3).

DISCUSSION

I. Disability Rating

The parties agreed that Claimant suffered a permanent partial disability to his right lower extremity. However, they disagreed about the level of the impairment. Claimant argued, based on Dr. Schuster's opinion, that he suffered a 35 percent impairment of the lower extremity. Employer favored Dr. Bradley's 17 percent rating. Neither Dr. Mandt nor Dr. Brigham gave Claimant an impairment rating, but Dr. Mandt stated that both ratings were within the acceptable range.

After reviewing the testimony and medical records of Dr. Bradley and Dr. Schuster, I find Dr. Bradley to be more credible. Dr. Bradley is a board-certified orthopedist. He examined Claimant twice, on August 25, 1999 and on April 28, 2001 (EX 8, p. 5; EX 10, p. 5). He obtained similar results on both occasions. In his deposition, he gave a detailed explanation of the measurements that he took and the manner in which he applied the formula of the *AMA Guides*. He stated that, if anything, he had overestimated the level of Claimants impairment but that he gave

Claimant "the benefit of the doubt" in assigning a 17 percent rating (EX 8, p. 33).

Dr. Schuster is board-certified in sports medicine and is also qualified to assign disability ratings (CX 20, p. 4). In fact, he testified that he has been rating patients for over ten years (CX 23, p. 4). He testified that he favored the *AMA Guides* because they help to ensure consistency in ratings (CX 23, p. 5). However, after reviewing the *Guides*. He admitted that he had incorrectly combined impairment ratings based on diagnosis, diminished range of motion, and muscle atrophy. He stated that if he had followed the stated criteria, the maximum impairment rating would be 20 percent (CX 23, pp. 24-5).⁵

Nevertheless, Dr. Schuster arbitrarily chose to disregard the instructions in the *Guides* regarding the combination of various impairment ratings (CX 23, p. 29). He attempted to justify this choice by referring to his discretion to choose the most clinically appropriate rating. However, he did not explain why his departure from the *Guides* was clinically appropriate (CX 23, pp. 25-9). His arbitrary departure from the *Guides* rendered his opinion internally inconsistent. He claimed expertise based on his extensive experience in applying the *Guides*. He praised the *Guides* for creating consistency among ratings by different doctors. However, his testimony in this case showed that misapplied the *Guides* and disregarded them

⁵ I note that Dr. Schuster's misreading of table 17-2 was quite blatant. He repeatedly stated that the table said that the three types of ratings could be combined, when even a cursory examination shows that this is not the case (CX 23, ex. 2). However, it required extensive colloquy with Claimant's attorney before Dr. Schuster would admit this. obvious fact (CX 23, p. 18).

when he found them to be inconvenient. While strict application of the *Guides* is not a legal requirement, a doctor's opinion must be well-reasoned in order to be persuasive. Dr. Schuster's inconsistent testimony regarding application of the *AMA Guides* renders his entire opinion suspect. Therefore, I credit Dr. Bradley's well-reasoned opinion over that of Dr. Schuster and accept Employer's contention that a 17 percent disability rating is correct. Therefore, Claimant should have received-disability payments for 17 percent of 288 weeks, or 48.96 weeks. 33 U.S.C. 908(c)(3).

II. Permanent Total Disability Compensation

Where a claimant has sustained an injury that falls under the schedule, the claimant is limited to a recovery for an award according to the provisions of the schedule absent a showing of total disability. Paying partial disability benefits based on a mere loss of wage-earning capacity that is less than the total loss of wage-earning capacity would run contrary to the controlling authority in *Potomac Electric Power Co. v. Director. OWCP [Pepco]*, 449 U.S. 268, 277; 14 BRBS 363 (1980). The Benefits Review Board ("the Board") has held that unless a worker is totally disabled he is limited to the compensation provided by the appropriate schedule provision. *Winston v. Ingalls Shipbuilding*, 16 BRBS 168, 172 (1984).

Because Claimant was paid a scheduled rating for his leg, additional, compensation can only be paid if no suitable alternative employment is available. Employer has shown that numerous jobs were available to Claimant. Employers' two vocational experts, Monte Ewald and Kent Shafer, identified twenty-three available jobs in a variety

of fields. All of these jobs were approved by Dr. Bradley⁶, treating physician Dr. Mandt, or both. Stan Owings, one of the vocational experts retained by Claimant, also agreed that Claimant was capable of returning to work and had an earning capacity whether or not he completed vocational retraining (CX 6, p. 175).

Only one of Claimant's experts, Carol Williams, argued that Employer had not shown suitable alternative employment.⁷ Williams believed that some of the jobs were inappropriate because Claimant's dexterity was limited by a prior hand surgery. However, no physician indicated that Claimant suffered any limitation due to hand surgery.⁸ Williams' generalization that employers favor younger workers for cashier positions is unsupported, and was not shared by the three other vocational experts who testified. Her statement that cashier positions would only be available part time is irrelevant as Employer need not show that Claimant could work full-time, only that he had some wage-earning capacity. Finally, her opinion that the assembly jobs required too much walking and standing

⁶ Dr. Bradley felt that security positions were inappropriate if Claimant would have to apprehend anyone, but Shafer's testimony and the specific job descriptions indicated that he would not.

⁷ Nowhere in his pre-hearing statement, oral argument or brief did Claimant argue that Employer had not shown suitable alternative employment. However, Employer must show suitable alternative employment before *Abbott* is relevant. The issue was not stipulated and, because Williams made the strongest argument that Employer had not met this element of the case, I address her argument to ensure that all elements of the case are met.

⁸ Williams is a registered nurse, not a physician. Furthermore, there is no indication that she examined Claimant physically or employed her medical expertise in any way in her evaluation of his capabilities.

was not shared by the physicians who approved the job descriptions. I conclude that Employer has shown suitable alternative employment and that Claimant retains some earning capacity.

However, Claimant argues that, pursuant to *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), he is entitled to total disability compensation enrolled in a vocational rehabilitation program. I agree. In *Brown v. National Steel and Shipbuilding*, 34 BRBS 195 (2001), the Board applied *Abbott* to a case arising under the law of the Ninth Circuit Court of Appeals, citing the Ninth Circuit's statement that one goal of the act was to further the rehabilitation of injured workers. *Brown* at 197, *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260; 23 BRBS 89, 95 (CRT). In *Brown*, the Board held that a claimant could receive total disability while enrolled in vocational retraining even if he had already received a scheduled award. *Brown* at 198.

Abbott does not apply to every case in which the claimant is enrolled in vocational rehabilitation. In *Kee v. Newport News Shipbuilding and Dry Dock Company*, 33 BRBS 221 (2000), the Board clarified that *Abbott* placed the burden on the claimant to prove that he is unable to perform suitable alternative employment due to his enrollment in vocational training. *Kee*, 33 BRBS, at 223. Claimant need not show that he was contractually precluded from working, only that he diligently sought but was unable to obtain suitable alternative employment that was compatible with his vocational rehabilitation. *Kee*, at 223.

The Board has stated that in applying *Abbott* the finder of fact should consider whether employer agreed to

the rehabilitation plan and continuing payment of benefits, whether the claimant's enrollment precluded employment, whether completion of the program would benefit the claimant by increasing wage-earning capacity, whether the claimant shows full diligence in completing the program, and other relevant factors. *Gregory v. Norfolk Shipbuilding and Dry Dock Company*, 32 BRBS 264, 266 (1998). In *Bush v. I.T.O. Corporation*, 32 BRBS 213 (1998), the Board found in favor of Claimant even though he had a college degree and had a capacity to earn more than minimum wage during rehabilitation. The Board emphasized that Claimant was not pursuing "a mere personal choice" but a program that his counselor had found would maximize his skills and minimize employer's liability. *Bush* at 219.

In the instant case, Employer has not approved the rehabilitation program. Although this is relevant, it cannot be the dispositive factor because such a decision would allow employers to veto an otherwise legitimate training program.

Furthermore, Claimant has shown that his enrollment effectively precluded other employment. He testified that he spent between three and four and a half hours per day commuting, twenty-five hours studying, and fifteen to eighteen hours in class, a total of between forty-six and fifty-four hours (Tr. 80). Both the length of his commute and its unpredictability are factors that would make it difficult to obtain outside employment. Carol Williams opined that Claimant's intellectual capacity as well as the long commute would cause him "a great deal of difficulty" in combining school with a job (CX 21, p. 25). Kent Shafer acknowledged that travel requirements combined with cognitive capacity could prevent some people from working

while in school (Tr. 109). He opined that Claimant could work while in school, but he was not aware of the length of Claimant's commute or Claimant's class schedule. Shafer never met with Claimant and therefore had less opportunity to assess his cognitive abilities than did Williams; who met with Claimant regularly (Tr. 96, CX 4).

Nevertheless, Claimant did attempt to secure employment. He worked briefly in a paid internship but was unable to continue due to his vocational program (Tr. 46).⁹ He also investigated at least some of the jobs that Shafer identified but found either that they were unavailable or that the required commute rendered them impractical (Tr. 48-9). Furthermore, Claimant entered vocational rehabilitation only after attempting to return to his original employment. He was not pursuing a "mere personal preference" in studying hotel management. Rather, the job was chosen by "a process of elimination (CX 21, pp. 19-20). Although Claimant at times expressed concerns about falling behind in school, his vocational records indicate that he has been enrolled in the program without significant interruption since 1999 and is on track to finish his education in June 2002 (CX 5, p. 84).

I find that Claimant and his vocational advisors reasonably determined that being trained in hotel management gave Claimant the best long-term earning potential. Starting wages in the hotel industry were in a range comparable to the jobs indicated by employer (CX 6,

⁹ Although Employer presents the fact that Claimant briefly obtained a paid internship as evidence of his earning capacity, I view his un rebutted testimony that he was unable to keep the internship while enrolled in school as stronger evidence to the contrary (Tr. 46).

p. 172; EX 13).¹⁰ With experience, however, statistical data indicated that average annual wages in the hotel industry in the Seattle area would be \$27,580, while Employer estimated that the jobs it found would pay approximately \$25,000 annually with experience (CX 6, p. 173).¹¹ As a manager at a larger hotel, Williams estimated that Claimant could earn between \$30,000 and \$40,000 annually (CX 12, p. 35). Employer argues that the training is not necessary because Claimant could obtain an entry-level position at a hotel without training. However, I find it reasonable to conclude that completing the training program would give Claimant greater potential to achieve a higher-paying management job. I find that Claimant is entitled to permanent total disability benefits pursuant to *Abbott* until June 7, 2002.

III. Average Weekly Wage

Claimant argues that his average weekly wage should be calculated under section 10(a) of the act, while Employer argues that it should be calculated under section

¹⁰ Most of the job's in Employer's survey paid between \$8.00 and \$10.00 per hour, or between \$16,640 and \$20,800 over an eight-hour day in a 260-weekday year (EX 13). Claimant's experts estimated a starting wage in the hotel industry at approximately \$16,000 per year (CX 6, p. 172).

¹¹ In fact, Employer did not provide information about the availability of or Claimants suitability for jobs that Claimant could find "with experience" outside the hotel field; however, assuming arguendo that Employer's figure is correct, it is still lower than the average wage for an experienced hotel employee in the Seattle area (EX 13, p. 14; CX 6, p. 173).

10(c). 33 U.S.C. 910(a), (c).¹² In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998), the Ninth Circuit stated that section 10(a) is presumptively the correct formula under which to calculate average weekly wage. *Matulic* at 1057. The *Matulic* court stated that "[t]he statute sets a high threshold and requires the application of 910(a) or 910(b) except in unusual circumstances." *Id.* The court acknowledged that application of 910(a) will create a certain amount of overcompensation because "virtually no one in the country works every working day of every work week." *Id.*, *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982). The court further reasoned that the point at which the disparity between the claimant's actual days worked and the 260-day standard that the statute sets for 5-day workers becomes unreasonable or unfair is "a question of line-drawing."

¹² Section-10(a) reads:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Section 10(c) reads:

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Matulic at 1058, *Duncanson-Harrelson* at 1343; 33 U.S.C. 910(a). Following *Duncanson-Harrelson*, the *Matulic* court concluded that when a claimant works more than 75% of the workdays of the measuring year, the presumption is that 910(a) applies. *Matulic* at 1058.

In the instant case Claimant a five-day worker, worked 1,611 hours or 201.35 days in the measuring year (CX 2, CX 3). Therefore, he worked 77.4% of the 260 days which constitute a standard year under the act. 33 U.S.C. 910(a). Pursuant to *Matulic*, his average weekly wage should be calculated under section 10(a).

Employer argues that additional evidence may overcome the presumption that section 10(a) applies. Employer attempts to distinguish the instant case from *Matulic* on the basis that Claimant has never earned the type of wages at which he would be compensated under section 10(a). However, this distinction is irrelevant. Although the *Matulic* court noted that *Matulic's* historic earnings were higher than the measuring year would indicate, the court specifically stated it did not rely on this fact. *Matulic* at 1058. The holding was based entirely on the fact that the claimant worked more than 75% of the days in the measuring year, and the same circumstances obtain here.¹³

Under section 10(a), the average, weekly wage of a five-day worker is calculated by multiplying the Claimants average daily wage by two hundred sixty and then dividing by fifty-two. 33 U.S.C. 910(a), (d)(1). In the measuring

¹³ This is not to say that the presumption that section 10(a) applies is irrebuttable, simply that the evidence proffered by Employer does not rebut it.

year, Claimant earned \$40,466 and worked 201.35 days. Therefore:

Average weekly wage: $\$40,466 / 201.35 \times 260 / 52 = \1004.37

Compensation rate: $\$1004.37 \times 2/3 = \669.58

ORDER

It is hereby ORDERED that

1. Employer shall pay Claimant permanent partial disability compensation for a scheduled injury to his right knee based on a 17 percent lower extremity disability rating and an average weekly wage of \$669.58 over 48.96 weeks, a total of \$32,782.64.
2. Employer shall pay out temporary total disability benefits from July 14, 1999 until August 13, 2000 and permanent total disability benefits from August 14, 2000 until June 7, 2002. Payments of temporary total disability and temporary partial disability prior to July 13, 1999 remain in effect.
3. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
4. Employer shall receive credit for any benefits previously paid to Claimant. No penalty shall be assessed until ten days after the employer is notified of the amount to be paid.
5. Employer shall continue to furnish such reasonable, appropriate, and necessary medical care for Claimants work-related injury pursuant to section 7 of the act.

App. 88

6. Within thirty days of receipt of this decision and order, Claimants attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

/s/ RK Malamphy
RICHARD K MALAMPHY
Administrative Law Judge

RKM/cmp
Newport News, Virginia

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONSTRUCTION
COMPANY; LIBERTY NORTH-
WEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO; DIRECTOR,
OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondents.

No. 03-72528

OWCP No. 14-129-450

BRB No. 02-0783

ORDER

(Filed May 20, 2005)

BEFORE: T.G. NELSON and RAWLINSON,
Circuit Judges, and SCHWARZER,*
Senior District Judge

Judge Rawlinson has voted to deny petitioners' petition for rehearing and rejects the suggestion for rehearing en banc; Judge T. G. Nelson and Judge Schwarzer have voted to deny the petition for rehearing and recommend rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

App. 90

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

33 U.S.C. Sections 908(c)(1)-(20)

908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

...

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

- (1) Arm lost, three hundred and twelve weeks' compensation.
- (2) Leg lost, two hundred and eighty-eight weeks' compensation.
- (3) Hand lost, two hundred and forty-four weeks' compensation.
- (4) Foot lost, two hundred and five weeks' compensation.
- (5) Eye lost, one hundred and sixty weeks' compensation.
- (6) Thumb lost, seventy-five weeks' compensation.
- (7) First finger lost, forty-six weeks' compensation.
- (8) Great toe lost, thirty-eight weeks' compensation.
- (9) Second finger lost, thirty weeks' compensation.
- (10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act [33 USC § 912], or a claim for compensation, under section 13 of this Act [33 USC § 913], shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the

entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed \$ 7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

33 U.S.C. Section 908(c)(21)

908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

...

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

...

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. Section 908(h)

908. Compensation for disability

...

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. Section 910(a) & (c)

§ 910. Determination of pay

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

...

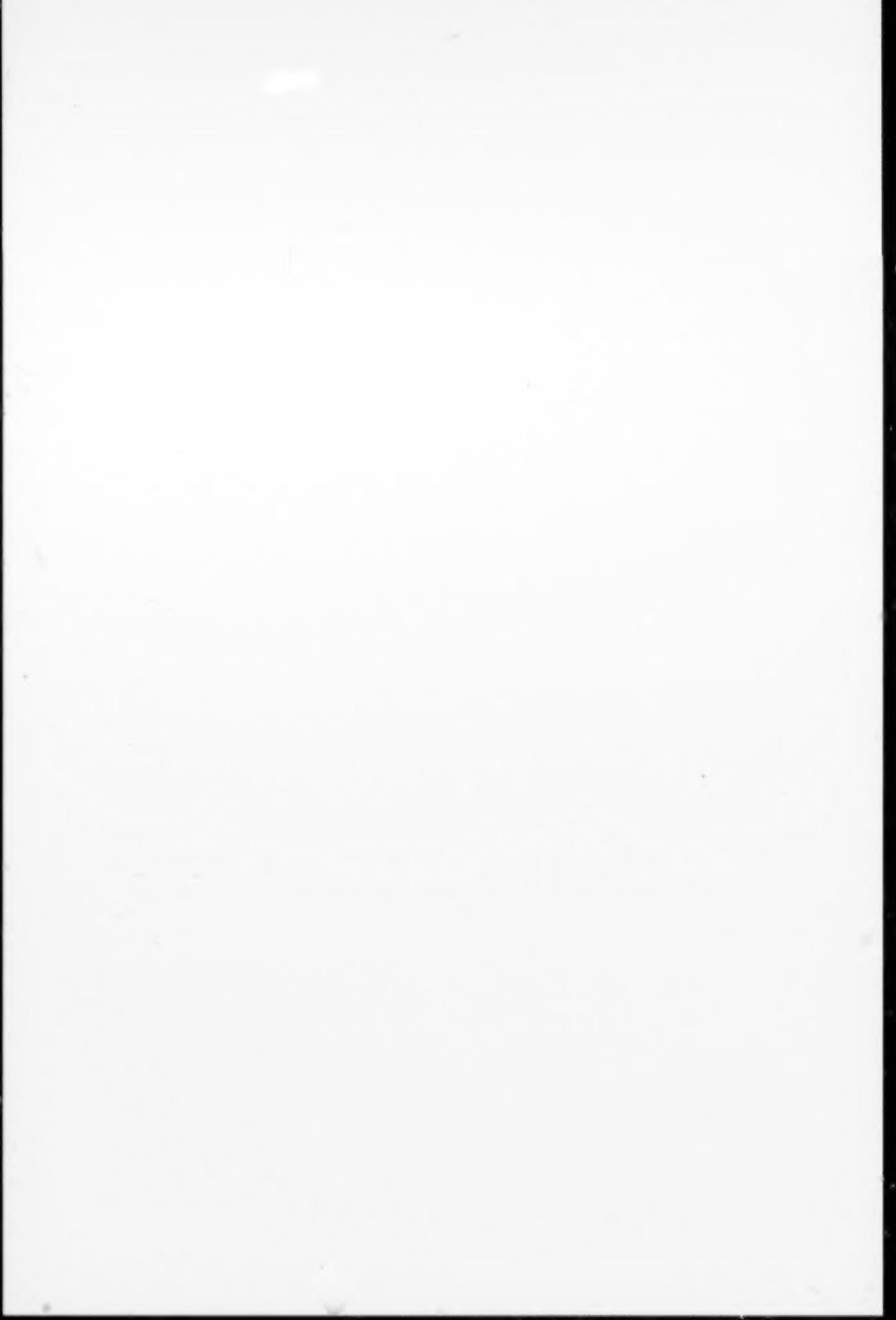
(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

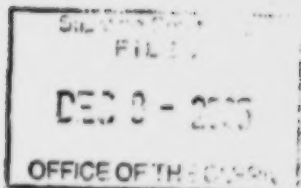
20 C.F.R. § 701.301 Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

...

(7) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and under this subchapter. These regulations substitute this term for the term *Deputy Commissioner* which is used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.





No. 05-371

In the Supreme Court of the United States

**GENERAL CONSTRUCTION CO., ET AL.,
PETITIONERS**

v.

ROBERT CASTRO, ET AL.

***ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
EDWARD D. SIEGER
ADAM NEUFELD
Attorneys
Department of Labor
Washington, D.C. 20210

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a claimant's average annual earnings used to determine his compensation rate under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, should be computed under 33 U.S.C. 910(a), rather than under 33 U.S.C. 910(c), when the claimant worked more than 75% of the workdays available for a five-day worker, the employment in which he worked was not seasonal, and there is no practical difficulty in applying Section 910(a).

2. Whether a worker who suffers an injury falling under the LHWCA's schedule for permanent partial disability benefits in 33 U.S.C. 908(c) may receive total disability benefits while participating in a vocational rehabilitation program approved by the Department of Labor's Office of Workers' Compensation Programs when such participation precludes otherwise suitable alternative employment.

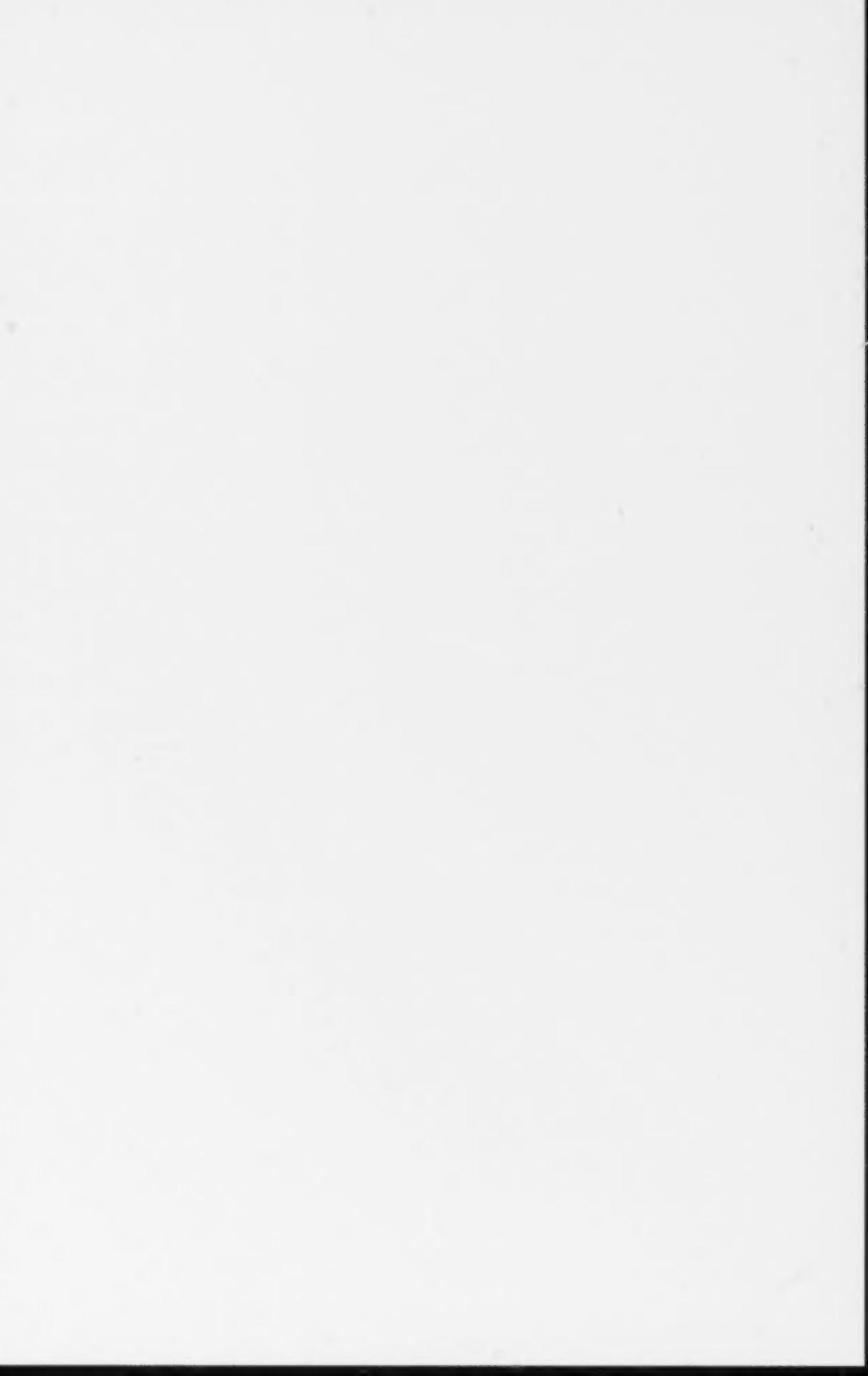


TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

<i>Baltimore & Ohio R.R. v. Clark</i> , 59 F.2d 595 (4th Cir. 1932)	11
<i>Bunge Corp. v. Carlisle</i> , 227 F.3d 934 (7th Cir. 2000)	2
<i>Chandris, Inc. v. Latsis</i> , 515 U.S. 347 (1995)	9
<i>Crum v. General Adjustment Bureau</i> , 738 F.2d 474 (D.C. Cir. 1984)	2
<i>DM & IR Ry. Co. v. Director, OWCP</i> , 151 F.3d 1120 (8th Cir. 1998)	13
<i>Gulf Best Elec., Inc. v. Methe</i> , 396 F.3d 601 (5th Cir. 2004)	9, 11
<i>Louisiana Ins. Guar. Ass'n v. Abbott</i> , 40 F.3d 122 (5th Cir. 1994)	3, 6, 12
<i>Marshall v. Andrew F. Mahoney</i> , 56 F.2d 74 (9th Cir. 1932)	10
<i>Matulic v. Director, OWCP</i> , 154 F.3d 1052 (9th Cir. 1998)	7, 8, 10, 11
<i>Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP</i> , 315 F.3d 286 (4th Cir. 2002) ...	3, 6, 12
<i>Norfolk Shipbuilding & Drydock Corp. v. Hord</i> , 193 F.3d 797 (4th Cir. 1999)	2, 13

IV

Cases—Continued:

Page

<i>Potomac Elec. Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	2, 3, 6, 7, 12, 13
<i>Stevedoring Serv. of Am. v. Price</i> , 382 F.3d 878 (9th Cir. 2004), cert. denied, 125 S. Ct. 1724 (2005) ...	7, 8, 10
<i>Strand v. Hansen Seaway Serv., Inc.</i> , 614 F.2d 572 (7th Cir. 1980)	10

Statutes:

<i>Longshore and Harbor Workers' Compensation Act</i> ,	
33 U.S.C. 901 <i>et seq.</i>	2
33 U.S.C. 902(10)	2
33 U.S.C. 904	2
33 U.S.C. 908	2
33 U.S.C. 908(a)-(c)	2
33 U.S.C. 908(a)	3, 5
33 U.S.C. 908(c)	4, 5
33 U.S.C. 908(c)(1)-(20)	3
33 U.S.C. 908(e)	2
33 U.S.C. 910	3
33 U.S.C. 910(a)	4, 5, 6, 7, 8, 9, 10, 11, 12
33 U.S.C. 910(b)	4
33 U.S.C. 910(c)	4, 5, 7, 10, 11
33 U.S.C. 910(d)(1)	3
33 U.S.C. 939(c)(1)	3
33 U.S.C. 939(c)(2)	3, 12
<i>Merchant Marines Act of 1920</i> , ch. 250,	
41 Stat. 988	9

In the Supreme Court of the United States

No. 05-371

GENERAL CONSTRUCTION CO., ET AL.
PETITIONERS

v.

ROBERT CASTRO, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 401 F. 3d 963. The decision of the Benefits Review Board (Pet. App. 32-62) is reported at 37 Ben. Rev. Bd. Serv. 65. The decision of the administrative law judge (Pet. App. 63-88) is reported at 36 Ben. Rev. Bd. Serv. 407.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2005. A petition for rehearing was denied on May 20, 2005 (Pet. App. 89-90). On July 21, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 17, 2005, and the petition was filed on September 19, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires covered employers to provide compensation for disability or death resulting from work-related injuries of covered employees. 33 U.S.C. 904, 908. The statute establishes four categories of disability benefits, distinguished by the degree of the disability (total or partial) and by its duration (permanent or temporary). 33 U.S.C. 908(a)-(c) and (e); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 (1980).

In general, disability means an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). To determine whether a claimant is totally disabled under that definition, courts apply a burden-shifting test. See *Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984). Under that test, an injured employee who cannot return to his or her usual work establishes a *prima facie* case of total disability. Pet. App. 10. The employer must then demonstrate the availability of suitable alternative employment. *Ibid.* If the employer makes that showing, the claimant may nonetheless be entitled to total disability benefits if the claimant is unable to secure such employment. *Ibid.*

Three courts of appeals have concluded that employees who are receiving vocational rehabilitation services under the direction of the Secretary of Labor, see 33 U.S.C. 939(c)(1) and (2), may be entitled to a total disability award. Pet. App. 10-15; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292-296 (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 127-128 (5th Cir. 1994). Depending on the facts of a particular case, participation in a vocational rehabilitation program may render a claimant unavailable to accept otherwise alternative employment. Pet. App. 11, 37; *Newport News*, 315 F.3d at 293-295; *Abbott*, 40 F.3d at 127-128.

An employee who suffers a work-related injury that falls under a "schedule" set forth in 33 U.S.C. 908(c)(1)-(20) is entitled to compensation for permanent partial disability whether or not his or her earning capacity has actually been impaired. *Potomac Elec.*, 449 U.S. at 269. An employee with such a "scheduled" injury can recover compensation for permanent partial disability only under the "schedule." *Id.* at 270-271. A scheduled injury can also give rise to an award for permanent total disability under 33 U.S.C. 908(a). 449 U.S. at 277 n.17. "[S]ince the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17.

b. Under the LHWCA, the basis for computing compensation is "the average weekly wage of the injured employee at the time of injury." 33 U.S.C. 910. "[A]verage weekly wage[]" is defined as "one fifty-second part of [the employee's] average annual earnings." 33 U.S.C. 910(d)(1).

There are three methods for determining an employee's average annual earnings. First, if the injured employee worked in the same employment in which he was injured "during substantially the whole of the year immediately preceding [the] injury," average annual earnings are determined by multiplying the claimant's average daily wage during that period by 300, in the case of a six-day worker, or 260, in the case of a five-day worker. 33 U.S.C. 910(a). Second, if the employee did not work in such employment during substantially the whole of the prior year, the same calculation is employed using the average daily wage of an employee of the same class engaged during the same period in the same or similar employment. 33 U.S.C. 910(b). Third, "[i]f either of the foregoing methods * * * cannot reasonably and fairly be applied," an employee's average annual earnings is the sum that "reasonably represent[s] the annual earning capacity of the injured employee," taking into account the claimant's previous earnings and the earnings of other employees in similar employment. 33 U.S.C. 910(c).

2. Respondent Roberto Castro injured his right knee in 1998 while employed as a pile driver by petitioner General Construction. Pet. App. 4, 33, 65. That type of injury is listed under the "schedule" in 33 U.S.C. 908(c). Pet. App. 7, 34-35, 77-79. After Castro underwent three reconstructive knee surgeries and attempted unsuccessfully to return to work at General Construction, his physician recommended vocational retraining. *Id.* at 4, 33-34, 66, 68. The Department of Labor's Office of Workers' Compensation Programs approved a vocational rehabilitation program under which Castro attended hotel management classes. *Id.* at 2, 5, 34, 64, 74. Castro filed a LHWCA claim seeking total disability compensation

for the period during which he was enrolled in the vocational rehabilitation program. *Id.* at 2, 34, 64. General Construction and its insurer, petitioner Liberty Northwest Insurance Corp., disputed Castro's entitlement to total disability compensation for the vocational rehabilitation period and argued that his average weekly wage should be computed under 33 U.S.C. 910(c) rather than 33 U.S.C. 910(a). *Id.* at 8, 64, 84-85.

3. An administrative law judge (ALJ) awarded permanent total disability compensation for the period during which Castro attended vocational training. Pet. App. 79-84. The ALJ reasoned that, because Castro's knee injury fell within the Section 908(c) "schedule," Castro had to establish a right to total disability compensation in order to avoid the limitations of the "schedule" for permanent partial disabilities. *Id.* at 79. The ALJ concluded that Castro was unable to return to his usual work. *Id.* at 35, 67-68, 74. The ALJ further found that he retained some wage-earning capacity because petitioners showed that Castro was capable of returning to work in a number of suitable alternative jobs. *Id.* at 79-81. The ALJ awarded compensation for total disability, however, because Castro showed that he could not perform such work while enrolled in vocational training. *Id.* at 81-82. The ALJ also found that Castro's long-term earning potential would be greater after completing the program. *Id.* at 83.

In calculating Castro's average weekly wage for purposes of setting compensation, the ALJ concluded that, under Ninth Circuit precedent, when a claimant works more than 75% of the work days in the measuring year, 33 U.S.C. 910(a) presumptively applies. Pet. App. 84-86. Castro worked 77.4% of the applicable work days and petitioners could not rebut the presumption, the ALJ

concluded, by arguing only that Castro had never actually earned the type of wages at which he would be compensated under 33 U.S.C. 910(a). Pet App. 86. The ALJ accordingly awarded compensation based on an average weekly wage of \$1004.37, *id.* at 87, rather than the \$756.65 for which petitioners argued. *Id.* at 6, 36.

4. The Benefits Review Board (Board) affirmed the ALJ's award of benefits. Pet. App. 32-62. The Board reasoned that, under the burden-shifting test that courts use in determining total disability, an injured claimant may establish entitlement to total disability compensation for periods during which he or she is enrolled in a vocational rehabilitation program. *Id.* at 42-43. The Board also concluded that the ALJ properly applied that test in this case. *Id.* at 46-50.

The Board also affirmed the ALJ's use of 33 U.S.C. 910(a) to calculate the average weekly wage. Pet. App. 55-60. The Board agreed with the ALJ that petitioners could not rebut the presumptive use of Section 910(a) solely by arguing that its use overcompensated Castro. *Id.* at 59-60.

5. The court of appeals affirmed the Board's decision. Pet. App. 1-31. The court agreed with the Fourth and Fifth Circuits that the LHWCA permits an award of total disability benefits during a period of vocational rehabilitation. *Id.* at 13-15; see *Newport News*, 315 F.3d at 292-293; *Abbott*, 40 F.3d at 127-128. The court rejected petitioners' arguments for denying compensation, including an argument that this Court's decision in *Potomac Electric* precludes an award. Pet. App. 15-20. The court of appeals explained that, in *Potomac Electric*, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, those benefits are the claimant's exclusive remedy and the claimant

cannot recover partial disability benefits based on loss of wage-earning capacity. *Id.* at 19. The court of appeals concluded that *Potomac Electric* does not address or preclude a claim for *total* disability, the kind of award at issue here. *Id.* at 20.

The court of appeals also upheld the use of 33 U.S.C. 910(a), rather than Section 910(c), to calculate the average weekly wage. Pet. App. 20-27. The court explained that under its earlier decision in *Matulic v. Director, OWCP*, 154 F.3d 1052, 1058 (9th Cir. 1998), Section 910(a) “presumptively applies when a claimant works more than 75% of the workdays of the measuring year.” Pet. App. 22 (internal quotation marks omitted). The court rejected petitioners’ argument that Section 910(a) should not apply because it would lead to overcompensation. *Id.* at 23-24. “Given the virtual inevitability of overcompensation under [Section 910(a)],” the court “decline[d] to interpret the existence of [Section 910(c)] as a statutory bar to any application of the LHWCA resulting in arguable overcompensation.” *Id.* at 24.

ARGUMENT

1. Petitioners contend (Pet. 9) that the court of appeals erred in adopting a rule that requires the application of Section 910(a) when an employee worked at least 75% of the workdays available for a five-day worker in the year prior to the injury. The Court recently denied a petition for a writ of certiorari in a case raising the same issue, see *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 883-885 (9th Cir. 2004), cert. denied, 125 S. Ct. 1724 (2005), and there is no reason for a different outcome here.

a. Petitioners contend (Pet. 10, 12 n.6) that the court of appeals’ decision imposes a rigid bright-line rule that

requires compensation under Section 910(a) when a claimant worked more than 75% of the workdays in the preceding year. That contention reflects a misreading of the court of appeals' decision. The Ninth Circuit did not hold that Section 910(a) must be applied in all cases in which an employee has worked at least 75% of the workdays. That court has expressly recognized that, even when an employee has worked at least 75% of the workdays, Section 910(a) does not apply when the nature of the claimant's work is seasonal or intermittent, *Price*, 382 F.2d at 884, when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under Section 910(a), *ibid.* or potentially in other special circumstances. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). At the same time, the court acknowledged that ALJs may apply Section 910(a) even "when the claimant has worked less than 75% of these days, if the reduction in working days is atypical of the worker's actual earning capacity." Pet. App. 22 (internal quotation marks omitted).

In this case, the court of appeals found that Castro worked 77.4% of the workdays in the year preceding his injury. Pet. App. 26-27. Petitioners presented no evidence that the nature of his employment was seasonal or intermittent, that an accurate calculation could not be made under Section 910(a), or that there was any other special circumstance that would make it unfair or unreasonable to apply Section 910(a). The Ninth Circuit therefore applied Section 910(a) in this case not because it invariably applies that subsection when a claimant worked at least 75% of the workdays of the preceding year, but because petitioners offered no persuasive reason that Section 910(a) should not apply given the facts of this case.

To the extent that petitioners object to any reliance on a percentage figure in determining whether Section 910(a) applies, that objection is misguided. The text of Section 910(a) expressly provides that its method of calculation applies not only when a claimant worked the entire year preceding the injury, but also when the claimant worked "substantially the whole of the year." 33 U.S.C. 910(a). In making a determination whether a claimant has worked "substantially" the whole of the year, a court must necessarily consider the percentage of days that the employee worked. And using a particular percentage figure as a rule of thumb to determine what is "substantially" the whole of the year eases administration of the statute and is consistent with the approach that the Court has adopted in other contexts. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995) (concluding, as an appropriate rule of thumb for the ordinary case, that a worker who spends less than 30% of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act (Merchant Marines Act of 1920, ch. 250, 41 Stat. 988)).

Congress's specification that Section 910(a) applies when a worker has worked "substantially" the whole of the year also answers petitioners' argument that the court of appeals' approach leads to overcompensation. By making Section 910(a) applicable when an employee has not worked the entire year, but only "substantially" the whole year, Congress clearly contemplated some degree of overcompensation. As the Fifth Circuit has explained, overcompensation "is built into the system." See *Gulf Best Elec., Inc. v. Methe*, 396 F. 3d 601, 606 n.1 (2004). And petitioners have not shown that a 75% figure departs so far from the customary hours worked in

the industry that it produces more overcompensation than Congress could have intended.

b. In any event, review of the first question presented is unwarranted because no other circuit has taken a position on whether the court of appeals' approach in this case best implements the LHWCA. Although the Seventh, Fifth, and Fourth Circuits have not adopted an approach like that of the Ninth Circuit (see Pet. 10-12), neither have they rejected such an approach. And their holdings are consistent with the Ninth Circuit's decision below.

Petitioners contend that the decision below conflicts with *Strand v. Hansen Seaway Service, Inc.*, 614 F.2d 572 (7th Cir. 1980). There is, however, no conflict. In that case, the Seventh Circuit applied Section 910(c), rather than Section 910(a), to a claimant who worked 84% of the available workdays in the preceding year because the court found the claimant's employment to be "seasonal." *Id.* at 574-576. That holding is consistent with the Ninth Circuit's approach, because the Ninth Circuit has expressly held that Section 910(a) does not apply to "seasonal" employment." *Price*, 382 F.3d at 884 (citing *Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74, 78 (9th Cir. 1932)).

In arguing that *Strand* conflicts with the decision below, petitioners rely (Pet. 11) on a statement of the court below that its decision in *Matulic* rejected *Strand*. Pet. App. 25. But that statement cannot transform consistent decisions into conflicting ones. The fact remains that both the Seventh Circuit and the Ninth Circuit apply Section 910(c), rather than Section 910(a), to seasonal employment, and petitioners have not identified any case in the 25 years since *Strand* was decided in which the Seventh Circuit has applied the statute to

non-seasonal employment in a way that is in conflict with the decision below.

Contrary to petitioners' contention (Pet. 12), the Fifth Circuit's decision in *Methe* also does not conflict with the Ninth Circuit's approach. In that case, the Fifth Circuit held that the ALJ erred in applying Section 910(c) rather than Section 910(a), where the claimant worked 91% of available workdays the year preceding the injury, and the only objection to applying Section 910(a) was that it would lead to overcompensation. 396 F.3d at 606-607. That holding is consistent with the decision below, because the Ninth Circuit would have reached the same conclusion. Although the Fifth Circuit did not adopt the Ninth Circuit's precise approach, it did not reject that approach either. *Id.* at 606. Indeed, the Fifth Circuit expressly relied on the Ninth Circuit's observation in *Matulic* that Congress intended for Section 910(a) to apply in most cases even though it results in overcompensation. 396 F.3d at 606 n.1.

Petitioners similarly err in contending (Pet. 12) that the decision below conflicts with the Fourth Circuit's decision in *Baltimore & Ohio R.R. v. Clark*, 59 F.2d 595 (4th Cir. 1932). In that case, the Fourth Circuit applied Section 910(c), rather than Section 910(a), because it concluded that the claimant's work was intermittent and discontinuous, and because the claimant worked only 48% of the workdays in the previous year. *Id.* at 599 (prior year's earnings were \$527.30, or 48% of the full-year earnings). That holding does not conflict with the Ninth Circuit's approach, because the Ninth Circuit would not apply a presumption in favor of the application of Section 910(a) to a claimant who worked only 48% of the workdays in the preceding year.

2. Petitioners contend (Pet. 13) that the court of appeals erred in holding that Castro could receive an award of total disability benefits for the time he spent participating in a Department of Labor-approved vocational rehabilitation program. That contention is without merit and does not warrant review.

The LHWCA distinguishes between partial and total disabilities, but it does not define the difference between the two. Filling that gap, the court of appeals reasonably concluded that a claimant who is enrolled in a rehabilitative program and can demonstrate that participation in the program precludes him from engaging in otherwise suitable employment may receive total disability benefits for the duration of the program. The LHWCA provides that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange * * * for such rehabilitation." 33 U.S.C. 939(c)(2). It is consistent with that directive and the rehabilitative goals of the Act to conclude that an employee may receive a total disability award for the period during which the claimant's participation in a rehabilitative program precludes him from accepting alternative work.

The decision below is consistent with the holdings of the only two other courts of appeals that have addressed the issue. In particular, both the Fourth and Fifth Circuits have held that employees who are receiving vocational rehabilitation services may be given a total disability award when participation in the program renders the claimant unavailable for employment. *Newport News*, 315 F.3d at 292-296 (4th Cir.); *Louisiana Ins.*, 40 F.3d at 127-128 (5th Cir.).

Petitioners contend (Pet. 14-15) that, under the Court's decision in *Potomac Electric Power Co. v. Direc-*

tor, OWCP, 449 U.S. 268 (1980), Castro's eligibility for an award of partial disability under the schedule precludes any alternative recovery. Petitioners' reliance on *Potomac Electric* is misplaced. In that case, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, the claimant may not elect to recover benefits for a *partial* disability based on the claimant's lost earning capacity. *Id.* at 273-274. That holding has no application here, because Castro is seeking to recover for a *total* disability, not a partial disability. As the Court explained in *Potomac Electric*, "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17; see *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 802 n.4 (4th Cir. 1999); *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 1122 (8th Cir. 1998).

Petitioners similarly err in contending (Pet. 16) that Castro's injury did not cause his inability to work during vocational rehabilitation. Castro's injury caused his need for vocational rehabilitation, and while in vocational rehabilitation, he could not participate in alternative work. Moreover, Castro participated in an OWCP-approved program, and did so because it gave him the best long-term earning potential. Pet. App. 83. In those circumstances, Castro's injury was a cause of his inability to work. In any event, that fact-bound question does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor

NATHANIEL I. SPILLER
Assistant Deputy Solicitor

EDWARD D. SIEGER

ADAM NEUFELD
Attorneys
Department of Labor

DECEMBER 2005

**In The
Supreme Court of the United States**

GENERAL CONSTRUCTION CO., ET AL.,

Petitioners,

v.

ROBERT CASTRO, ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF FOR RESPONDENT CASTRO IN
OPPOSITION TO PETITION FOR CERTIORARI**

JOSHUA T. GILLELAN II
Counsel of Record
**LONGSHORE CLAIMANTS'
NATIONAL LAW CENTER**
Georgetown Place, Suite 500
1101 30th Street, N.W.
Washington, DC 20007
(202) 625-8331

**WILLIAM D. HOCHBERG
NICOLE A. HANOUSEK**
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

Counsel for Respondent

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals erred in adopting a rule that an ALJ cannot resort to the broad discretion of § 10(c) of the Longshore Act to fix the worker's "average annual earnings" (on which compensation rates for disability and death under the Act are based), instead of following the arithmetic formula provided by § 10(a) or (b), solely because the worker has been employed for somewhat less than the idealized numbers of days of work per year on which the calculation prescribed by § 10(a) or (b) is based, and in establishing 75 percent of those numbers of days as the upper limit of work in the year preceding the injury for which resort to § 10(c) may be warranted based on the missed work alone.

2. Whether the court of appeals erred in approving the administrative construction of §§ 2(10) and 8 of the Longshore Act, according to which a worker is totally "incap[able] because of injury to earn [any] wages" during a period in which, although he or she could otherwise perform some available work, he or she is engaged in a course of vocational retraining, too intensive to allow concurrent employment, which the delegate of the Secretary of Labor has determined to be appropriate to the worker's situation under § 39(c)(2) of the Act and its implementing regulations.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Table of Authorities	iii
Opinions Below and Jurisdiction	1
Statement	1
Reasons for Denial of the Writ	13
I. The Decisions Below Are in Accordance with Law in Applying § 10(a) Rather Than § 10(c) to Determine Castro's Compensation; There Is No Real Conflict Among the Circuits, and This Would Not Be an Appropriate Case for Consid- eration of the Issue in Any Event	13
A. Validity of the Ninth Circuit Rule	13
B. No Conflict	17
C. Inappropriate Case for Consideration of the Question	20
II. The Award of Compensation for Total Disabil- ity During Castro's OWCP-Approved Full- Time Retraining Program Does Not Conflict with This Court's Decision in <i>PEPCO</i> or with Any Decision of Another Court of Appeals	21
A. Total Disability During Retraining in General	21
B. Effect of the "Schedule" and <i>PEPCO</i>	21
Conclusion	26

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Abbott v. Louisiana Insurance Guarantee Ass'n</i> , 40 F.3d 122 (5th Cir. 1994).....	<i>passim</i>
<i>Baltimore & O. R.R. v. Clark</i> , 59 F.2d 595 (4th Cir. 1932)	19
<i>Brown v. National Steel & Shipbuilding</i> , 34 Ben Rev. Bd. Serv. (MB) 195 (2001).....	9
<i>Chesapeake & Ohio R. Co. v. Schwalb</i> , 493 U.S. 40 (1989)	1
<i>Director, OWCP v. Perini North River Assoc.</i> , 459 U.S. 297 (1983)	1
<i>Duhagon v. Metropolitan Stevedore Co.</i> , 169 F.3d 615 (9th Cir. 1999).....	20
<i>Gros v. Fred Settoon, Inc.</i> , 865 So.2d 143 (La. App. 2003), <i>cert. denied</i> , 871 So.2d 352 (La.), <i>cert. denied</i> , 125 S. Ct. 408 (2004)	25
<i>Gulf Best Electric, Inc. v. Methe</i> , 396 F.3d 601 (5th Cir. 2004)	19
<i>Hairston v. Todd Shipyards Corp.</i> , 849 F.2d 1194 (9th Cir. 1988).....	2
<i>Harbor Tug & Barge Co. v. Papai</i> , 520 U.S. 548 (1997)	25
<i>Ingalls Shipbuilding, Inc. v. Wooley</i> , 204 F.3d 616 (5th Cir. 2000).....	16
<i>Jonathan Corp. v. Brickhouse</i> , 142 F.3d 217 (4th Cir. 1998)	25
<i>Matulic v. Director, OWCP</i> , 154 F.3d 1052 (9th Cir. 1998)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Brickhouse)</i> , 315 F.3d 286 (4th Cir. 2002)	<i>passim</i>
<i>Palombo v. Director, OWCP</i> , 937 F.2d 70 (2d Cir. 1991)	2
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	<i>passim</i>
<i>Railco Multi-Construction Co. v. Gardner</i> , 902 F.2d 71 (D.C. Cir. 1990)	1
<i>Rivera v. United Masonry, Inc.</i> , 948 F.2d 774 (D.C. Cir. 1991)	3
<i>Roger's Terminal & Shipping Co. v. Director, OWCP</i> , 784 F.2d 687 (5th Cir. 1986)	2
<i>See v. Washington Metropolitan Area Transit Authority</i> , 36 F.3d 375 (4th Cir. 1994)	2
<i>Stevedoring Services of Am. v. Price</i> , 382 F.3d 878 (9th Cir. 2004)	11, 13, 19
<i>Strand v. Hansen Seaway Service</i> , 614 F.2d 572 (7th Cir. 1980)	17, 18, 20
 STATUTES & RULES:	
Defense Base Act, 42 U.S.C. §§ 1651-54	1
Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. §§ 901-50	1
§ 2, 33 U.S.C. § 902	1, 2
§ 3, 33 U.S.C. § 903	2
§ 5, 33 U.S.C. § 905	2
§ 6, 33 U.S.C. § 906	2

TABLE OF AUTHORITIES - Continued

	Page
§ 7, 33 U.S.C. § 907	2
§ 8, 33 U.S.C. § 908	<i>passim</i>
§ 9, 33 U.S.C. § 909	2
§ 10, 33 U.S.C. § 910	<i>passim</i>
§ 14, 33 U.S.C. § 914	14
§ 19, 33 U.S.C. § 919	10
§ 21, 33 U.S.C. § 921	9
§ 39, 33 U.S.C. § 939	5, 21
§ 40, 33 U.S.C. § 940	5
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1948, Pub. L. No. 80-757, 62 Stat. 602 (1948).....	16
Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73	1
Outer Continental Shelf Lands Act, 43 U.S.C. § 1333.....	1
20 C.F.R. §§ 701.201-203	10
20 C.F.R. § 701.301.....	5

OTHER AUTHORITIES:

Benefits Review Board, LONGSHORE DESKBOOK (2005)	15
H.R. REP. NO. 2095, 80TH CONG., 2D SESS. (1948).....	18
S. REP. NO. 1315, 80TH CONG., 2D SESS., <i>reprinted in 1948 U.S. Code Cong. & Admin. News</i> 1979 (1948)	18

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert Castro hereby urges the Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

Petitioners accurately recite the reportage of the opinions below and the bases on which this Court's jurisdiction is invoked.

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act¹ is the only federal private-sector workers'-compensation law.² Its benefit provisions are based closely

¹ Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, as amended, 33 U.S.C. §§ 901-50 ("Longshore Act").

² The Act's own "coverage" is now limited principally by the requirement that the injured worker have been "engaged in maritime employment." *Id.* § 2(3), as amended, 33 U.S.C. § 902(3); see, e.g., *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983); *Chesapeake & Ohio R. Co. v. Schwalb*, 493 U.S. 40 (1989). Its application has been extended to other types of employment, however, by the Defense Base Act, 42 U.S.C. §§ 1651-54; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b); and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73. (Its former application to private employment in the District of Columbia (District of Columbia Workmen's Compensation Act of 1928, 45 Stat. 600) has been supplanted by District "home-rule" legislation since 1982 (see generally, e.g., *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 73-74 & nn.2-4 (D.C. Cir. 1990).)

on those of state laws on the same subject; it imposes no-fault liability on the employer, for medical benefits and for periodic benefits for disability or death caused by injuries "arising out of and in the course of employment" and by occupational diseases. Longshore Act §§ 2(2), 3(a), 7-9, 33 U.S.C. §§ 902(2), 903(a), 907-909. As a general proposition, the Longshore Act forecloses tort remedies against an insured employer, and also recovery from a vessel owner or operator (whether or not it is the employer) based on "unseaworthiness," for injuries within its coverage. *Id.* § 5(a), (b), 33 U.S.C. § 905(a), (b).

Periodic compensation for disability or death under the Act is based (subject to upper and lower limits established by §§ 6(b) and 9(e), 33 U.S.C. §§ 906(b), 909(e)) on the worker's "average weekly wage" – one fifty-second of his or her pre-injury "average annual earnings" as determined under § 10(a), (b), or (c), 33 U.S.C. § 910(a)-(c) (set out at Pet. App. 96). For *total* disability, whether temporary or permanent,³ weekly compensation is fixed at two-thirds of

³ Petitioners' description of the grid of classes of disability (temporary or permanent, total or partial), Pet. 4, is incorrect in several respects. Temporary-total- or -partial-disability status, for example, does not depend on whether the recovering injured worker "is expected to recover and return to *full* employment," *id.* (emphasis added), but only on whether he or she is expected to recover *some* substantial earning capacity that is then lacking. More importantly, in contradistinction to Social-Security-disability law, in workers'-compensation law generally and under the Longshore Act in particular, it is not simply whether the injured worker is able or "unable to perform any gainful employment," *id.*, that determines the extent of disability, but rather whether he or she is able to perform *and can reasonably compete for and obtain* such work in his or her local labor market. *E.g.*, *Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 690-91 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988); *Palombo v. Director, OWCP*, 937 F.2d 70, 73-75 (2d Cir. 1991); *See v. Washington Metropolitan Area* (Continued on following page)

the average weekly wage, payable so long as such disability continues. Longshore Act § 8(a), (b), 33 U.S.C. § 908(a), (b). For *partial* disability, whether temporary or permanent but "unscheduled," it is two-thirds of the difference between the "average weekly wage" and the disabled worker's residual weekly "wage-earning capacity" as determined under section 8(h) of the Act, likewise payable indefinitely (except for a five-year maximum for *temporary partial*). *Id.* § 8(c)(21) (set out at Pet. App. 94), (e). But for *permanent partial* disability that is "scheduled" – i.e., that results entirely from an injury to a member or faculty listed in the "schedule" of impairments in § 8(c)(1)-(19) of the Act (total or partial loss, or "loss of use," of a listed member or faculty) (set out at Pet. App. 91-93) –, compensation is at the full rate of two-thirds of the pre-injury average weekly wage for the fixed period applicable under the schedule.⁴

2. On November 20, 1998, while descending from a crane in the course of his employment with Petitioner General Construction, Respondent Robert Castro slipped and fell, tearing the anterior cruciate ligament in his right knee. *E.g.*, Pet. App. 66.⁵ After a period of recovery including three surgical procedures, he was left upon achievement of

Transit Authority, 36 F.3d 375 (4th Cir. 1994); but cf. *Rivera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991) (effect of injured worker's undocumented-alien status on availability of alternative work should be disregarded).

⁴ As one would expect, the overwhelming majority of "scheduled"-injury cases involve a "partial loss of use" of a scheduled member or faculty, for which the period of compensation is the "proportional" part of the figure fixed by § 8(c)(1)-(14). *Id.* § 8(c)(18)-(19).

⁵ Unless otherwise indicated, the citations herein for the relevant facts are to the ALJ's decision (Pet. App. 63-88).

his maximum medical improvement in August 2000 with reduced range of motion (both flexion and extension) in the knee joint and muscle atrophy. *Id.* at 66-67. Both Castro's treating physician and the doctor engaged by Petitioners to examine his condition agreed that the restrictions imposed by this impairment effectively ended the career as a pile-driver carpenter in which Castro had engaged since 1973. *Id.* at 66, 67-68. Physicians engaged by both sides variously rated the "permanent impairment" of his right leg under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* at from 10 percent to 35 percent.⁶ *Id.* at 67-70 & n.4.

Petitioners initially paid Castro compensation under the Act for temporary total disability at a rate based on an average weekly wage of \$988.62 (Pet. App. 76). In July 2000, however, they initially indicated that his continuing payments would be reduced to a \$500-a-week wage basis, but eight days later reinstated payments based on a "recalculated" wage of \$756.65 (*id.*). Upon his achievement of "maximum medical recovery" shortly after his third surgery, in August 2000 (*id.* at 68), Petitioners instituted payments at that rate for scheduled permanent partial disability, and continued such payments for a period of 48.97 weeks, appropriate to its examiner's rating of 17-percent

⁶ Use of the degree of "permanent impairment" under the regime of the *AMA Guides* as the degree of "partial loss of use" under LHWCA § 8(c)(19) is not provided for by the Act's schedule, which incorporates the *Guides'* methodology only with respect to hearing loss and impairments resulting to retirees from delayed-onset occupational diseases (§§ 8(c)(13)(E), 8(c)(23), 2(10)); but such use is common, and was assumed to be appropriate, to the extent a "scheduled" award for permanent partial disability is appropriate, in the proceedings below in the present case.

impairment of the leg (*id.* at 67 n.4). Castro had attempted unsuccessfully to return to work for General Construction in June-July 1999 (*id.* at 66); he did so again, in a lighter-duty capacity, after his August 2000 release from medical treatment, but the duties of even that work were beyond his impaired capacity, and the treating physician opined that he should seek vocational retraining (*id.* at 68).

Meanwhile, in December 1999-January 2000 and between June 2000 and April 2001, Petitioners had Castro's job-placement potential evaluated by vocational consultants, who identified a number of unskilled light-duty jobs, paying \$8 to \$10 an hour, in the greater-Seattle area, whose requirements were approved as appropriate by Castro's physician and Petitioners' consulting physicians (Pet. App. 70-72). Although Castro tried to follow up on some of the identified positions, he found that they were either unavailable or too far away from his home on Bainbridge Island, making the commute impractical (*id.* at 73, 74).

The local office of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), exercising the authority of the Secretary of Labor under § 39(c)(2) of the Longshore Act, 33 U.S.C. § 939(c)(2), to direct vocational rehabilitation, developed a retraining plan for Castro. After evaluation of his skills, knowledge, aptitudes, physical limitations, and interests, and his high motivation to develop an alternative career, the vocational counselor engaged by the OWCP recommended a retraining plan for a career in hotel-motel management, which involved a two-year course of study at a local community college (Pet. App. 73-74). The local OWCP district director (the statutory "deputy commissioner," *see* Longshore Act § 40; 20 C.F.R. § 701.301(a)(7), set forth at Pet. App. 97)

adopted that plan, over Petitioners' objections, without acceding to Petitioners' demand for a hearing before an ALJ on the appropriateness of the plan; and Petitioners did not appeal the adoption of the plan to the Benefits Review Board (*id.*; see also *id.* at 36-37, 52-55 & n.9 (Board decision); *id.* at 5 n.1 (court of appeals)). Castro began courses in September 2000, and was scheduled to complete the program in June 2002 (*id.* at 74; see also *id.* at 34 (Board decision)). The program required work in an "internship," whether paid or unpaid; qualifying paid positions were "very rare," and although Castro secured such a position that was supposed to pay \$7.75 an hour, he was unable to sustain it and resigned after working only 80 hours in order to keep up with his course work (*id.* at 75, 83 n.9).⁷

3. Castro claimed that Petitioners' compensation payments had been based on a lower average-weekly-wage basis than appropriate; that the degree of his loss of use of his leg was greater than the 17 percent for which Petitioners had paid; and that he should be paid for total disability during the period of his OWCP-sponsored and -approved retraining program (Pet. App. 65). In a May 2002 decision following a June 2001 hearing, a Department of Labor administrative law judge ("ALJ") credited the 17-percent

⁷ Petitioners' recitation (without benefit of citation to the record) that Castro "had already worked" at that job for over 80 hours at the time of his testimony before the ALJ, Pet. 7, is potentially misleading. It is likely that the result below would have been different if the record bore out the natural signification of this phrase. The ALJ, however, credited Castro's testimony that he was unable to keep up with his class work while so employed and accordingly gave it up after only about 80 hours' work.

rating (*id.* at 77-79), and that finding was not further contested.

On the wage-basis issue, the evidence showed without dispute that Castro had been employed by two companies, MKB Construction and Petitioner General Construction, in the year before the injury, working forty hours in "most" of the weeks when so employed, and amassing 1,611 hours of work, for which he was paid \$40,466 (Pet. App. 76-77).⁹ The evidence did not show the actual number of individual days on which he worked, but showed a gap of about seven weeks between his layoff by MKB, at the end of a project, and his commencement of work for General (Claimant's Exh. 2, 3). Castro explained that layoffs at the ends of projects were a common feature of pile-butt work, but that the length of the seven-week gap in his employment in 1998 was attributable in substantial part to his choice to stay off work in order to pursue the permitting process for installation of a bulkhead at his home, and that that was the only time in the three years before the injury when he had voluntarily taken time off from work (Hrg. Transcript 49-50). The ALJ followed the methodology of § 10(a) of the Act, finding that Castro had "worked [as a pile driver] during substantially the whole of the year immediately preceding his injury," *id.*; equating his 1,611 hours of work to 201.35 regular eight-hour days, he divided the total earnings by that number and multiplied by 260 as specified in § 10(a), before dividing the result by 52 in accordance with § 10(d) to arrive at an average weekly wage of

⁹ The ALJ did not reconcile this figure - which included only \$36,358 earned in calendar 1998 up to the time of the November 20 injury (Pet. App. 77) - with his recitation that Castro earned \$39,717.62 in calendar 1998 (*id.* at 76).

\$1,004.37 (Pet. App. 77, 86-87). The ALJ did not consider independently whether the 201.35 days' work he found constituted "substantially the whole of the year," but applied the "bright-line rule" of *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), that anything over 75 percent of the idealized number of work days posited by § 10(a)-(b) qualifies for treatment under the regime of those subsections, instead of calling for the exercise of the ALJ's authority to fix a figure as the worker's "annual earning capacity" by reference to all the circumstances under § 10(c). The ALJ therefore did not even consider whether Castro's "earning capacity" would be most "reasonably represent[ed]" within the meaning of § 10(c) by Petitioners' contention, that he should simply divide Castro's total actual earnings in the year before the injury by 52, or by the figure he derived under § 10(a), or by something in between. Based on his weekly-wage finding, he determined that the appropriate compensation rate was \$669.58 (two-thirds of \$1,004.37) (Pet. App. 87).

The ALJ further determined that Castro's disability, from the time he reached "maximum medical improvement" from his injuries, should be classified as permanent total disability, compensable under § 8(a) of the Act, during the period of his vocational retraining under the plan approved by the Department of Labor (Pet. App. 79-84). He found that, as Petitioners contended (and, as he noted, Castro did not dispute), Castro was physically and otherwise qualified for some substantial employment that would be available to him absent the retraining program (*id.* at 79-81 & n.7). He acknowledged that under *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) ("PEPCO"), to the extent Castro's disability after achieving medical recovery was only partial, he would qualify for

compensation only under the § 8(c) "schedule" (*id.* at 79). But he found that Castro had shown that he could not have kept up with his studies in the retraining program and engaged in paying employment at the same time; he pointed out that Petitioners' vocational consultant's opinion to the contrary was expressed without awareness of either the length and unpredictability of Castro's commute or his class schedule, and credited instead the OWCP counselor's view that working at a paying job while in school "would cause him 'a great deal of difficulty,'" a view buttressed by Castro's credited testimony that he was unable to continue his paid hotel internship (*id.* at 82-83). The ALJ also examined the appropriateness of the hotel-management course of study adopted by the OWCP, and found it "reasonable" to maximize Castro's earning potential with his reduced physical capacity (although even so it would not bring him up to his pre-injury level of earnings) (*id.* at 83-84). Accordingly, the ALJ held that under *Abbott v. Louisiana Insurance Guarantee Ass'n*, 40 F.3d 122 (5th Cir. 1994) (Byron White, J.), *aff'g* 27 Ben. Rev. Bd. Serv. (MB) 192 (1993), and *Brown v. National Steel & Shipbuilding*, 34 Ben. Rev. Bd. Serv. (MB) 195 (2001), Castro should be compensated for permanent *total* disability for the duration of the retraining program (*id.* at 84).

4. On Petitioners' appeal from the ALJ's award under § 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), the Benefits Review Board affirmed (Pet. App. 32-60). The Board held that in following the wage-basis calculus of § 10(a), (d)(1), the ALJ had properly followed the rule of *Matulic*, supported by the Director of the OWCP (the delegate of the authority of the Secretary of

Labor for administration of the Longshore Act⁹): that, so long as an injured employee has worked at least 75 percent of the number of days specified in § 10(a) and (b) in the year preceding the injury, he or she has been employed for "substantially the whole of the year," and the disparity between the result of the arithmetic calculation called for by those subsections and his or her actual earnings in that year does not, standing alone, establish that the former does not "reasonably represent [his or her] annual earning capacity" within the meaning of § 10(c) so as to call for the more detailed inquiry called for by that subsection (Pet. App. 55-60).

The Board further rejected Petitioners' procedural challenge to the OWCP's adoption of the retraining program for Castro without affording them a hearing before an ALJ (notwithstanding the ALJ's explicit consideration of and agreement with the reasonableness of the plan) (Pet. App. 50-55). The Board explained that the determination of appropriate retraining is committed by the Act to the Secretary of Labor (and delegated by the Secretary to the local district directors) under § 39(c)(2) of the Act and the regulations implementing that provision, rather than committed to the APA-formal-hearing process before ALJs as are determinations of the compensation payable, under § 19(c)-(e), 33 U.S.C. § 919(c)-(e) (Pet. App. 50-54).

Petitioners also contended before the Board that the legal principle underlying the ALJ's total-disability award during retraining was erroneous. The Board rejected that argument (Pet. App. 36-45). It explained that the rule that while an injured worker is pursuing an OWCP-approved

⁹ See, e.g., 20 C.F.R. §§ 701.201-203.

plan of full-time vocational rehabilitation that forecloses engagement in otherwise available employment, he or she should be treated as totally disabled, is not a "novel legal concept." Rather, it is merely an application of the commonplace proposition that an injured worker's disability is measured, not merely by the *existence* of work within his or her residual capacity and qualifications, but on the reasonable, practical *availability* of such work *to him or her*, to the special situation of a full-time retraining program, and rests on recognition that alternative work that is otherwise suitable is *not* realistically "available" to the worker during such a program (Pet. App. 42-43). The rule had been consistently applied where appropriate in a substantial line of decisions of the Board, was fully supported by the construction of the Act by the Director, OWCP, and had been fully approved by the two courts of appeals called upon to consider its propriety (*Abbott, supra* at 8, and *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Brickhouse)*, 315 F.3d 286, 293-96 (4th Cir. 2002)) (Pet. App. 44-45).

Finally, the Board found that the ALJ's determination that alternative paying employment was not reasonably available to Castro during his retraining courses was supported by the substantial evidence on which the ALJ reasonably relied, and accordingly that the award of compensation for total disability during the retraining period was in accordance with law (Pet. App. 46-50).

5. On Petitioners' petition for review of the Board's decision by the Ninth Circuit under § 21(c) of the Act, 33 U.S.C. § 921(c), the court affirmed (Pet. App. 1-31). Like the Board, despite the obvious controlling force of its 1998 decision in *Matulic*, and its recent iteration of the rule of that decision in *Stevedoring Services of Am. v. Price*, 382

F.3d 878, 884-85 (9th Cir. 2004) (claimant's work on 197 days, or barely 75 (75.77) percent of § 10(a) multiplier of 260, warranted use of § 10(a) under *Matulic*), *cert. denied*, 125 S. Ct. 1724 (2005), the court again explained the basis of the rule and its applicability to Castro's case (Pet. App. 20-27).

The court of appeals also affirmed the Board's rejection of Petitioners' assertion that the adoption of the vocational-rehabilitation plan by the OWCP, without an opportunity for an ALJ hearing and decision on its appropriateness, violated its procedural rights; that determination was reserved to the discretion of the Secretary and her delegate in the local OWCP office (Pet. App. 27-31). Petitioners do not pursue that assertion before this Court.

Finally, the court of appeals joined the other circuits that have considered the question in approving the administrative construction of "disability" under the Act with respect to the status of a permanently disabled worker whose engagement in an OWCP-approved, full-time retraining program realistically forecloses otherwise available work (Pet. App. 12-15), and rejected Petitioners' six asserted bases for distinguishing the decisions of the other courts of appeals (*id.* at 15-20). It rejected most of those contentions on the ground that they were based on characterizations of the evidence contrary to the ALJ's findings of fact supported by substantial evidence (*id.* at 16-19). But it found Petitioners' final contention, that the application of the *Abbott* principle to a claimant whose permanent disability is limited to a "scheduled" member is foreclosed by this Court's decision in *PEPCO*, *supra* at 8, erroneous as a matter of law; *PEPCO*'s holding that partially-disabled claimants under the Act whose injuries are limited to scheduled members are limited to recovery

under the schedule, and cannot recover for their permanent partial losses of earning capacity as determined under § 8(c)(21), (h), expressly excepted cases in which the disability resulting from such an injury is not partial but total, and Castro's disability during retraining was in the latter category (Pet. App. 19-20).

REASONS FOR DENIAL OF THE WRIT

I. The Decisions Below Are in Accordance with Law in Applying § 10(a) Rather Than § 10(c) to Determine Castro's Compensation; There Is No Real Conflict Among the Circuits, and This Would Not Be an Appropriate Case for Consideration of the Issue in Any Event.

A. Validity of the Ninth Circuit Rule

The court of appeals adheres to a rule that the application of § 10(a) is required where the only ground asserted for its inapplicability is that the claimant worked less than the idealized number of workdays on which its calculation is based, so long as he or she has worked at least 75 percent of that number of days in the year preceding the injury. Petitioner argues (Pet. 9-13) that such a rule conflicts with the "clear statutory language" providing that § 10(c), rather than § 10(a), should be used when the latter cannot "reasonably and fairly be applied," and that it conflicts with authorities in other circuits. That contention does not warrant review.

First, Petitioners' statement of the court of appeals' rule somewhat misrepresents it. *Matulic*, *Price*, and the decision below hold only that so long as the claimant has worked at least 75 percent of the idealized number of

workdays specified in § 10(a), the fact that the use of that number as the multiplier of the worker's "average daily wage" somewhat overrepresents the worker's actual annual earnings, *standing alone*, does not warrant the conclusion that § 10(a) "cannot reasonably and fairly be applied," and the consequent substitution of the detailed, individualized inquiry called for by § 10(c) for use of the § 10(a) calculus. The only "bright-line rule" involved is that § 10(c) "may not be invoked in cases in which the *only* significant evidence that the application of [§ 10(a)] would be unfair or unreasonable is that claimant worked [less than the number of days specified in § 10(a), so long as he or she worked] more than 75% of th[os]e days[,] in the year preceding the injury." *Matulic*, 154 F.3d at 1058-59 (emphasis added), *quoted*, Pet. App. 22 n.11.

Such a rule plainly serves the very purpose of § 10(a). Just as the court of appeals has observed, a degree of overrepresentation, or "idealiz[ation]," of a worker's earnings history is built into the calculus called for by § 10(a); virtually no one actually works 52 full weeks in a year. This is a workers'-compensation program; employers are responsible to institute payments promptly upon knowing of an employment-related disability or death, without awaiting the filing of a claim, the engagement of counsel, or the development and submission of evidence by the worker (see Longshore Act § 14(a)-(b), (e), 33 U.S.C. § 914(e), (b), (e)), and it is critical to the prompt-delivery-of-benefits objective that is at the heart of the workers'-compensation compromise of interests that they do so in the great majority of cases. The mechanical and simple calculation called for under § 10(a) permits this objective to be readily accomplished in most cases; the employer's or its insurer's claims staff need only scan the injured

worker's pay records and divide the number of days worked by the total earnings to arrive at an average daily wage, and multiply it by five (conflating the statutory steps of multiplying by 260 (assuming the usual workweek is five days) and dividing by 52 under § 10(d)(1)) to arrive accurately at the wage basis for prompt, dispute-free payments. Petitioners' staff apparently accomplished the application of such methodology in the present case, initially basing its payments on a wage basis of \$988.62, less than \$16 short of that determined by the ALJ under § 10(a) (producing payments only about \$10 a week less than was awarded after needless litigation of the wage-basis issue).

Section 10(c), on the other hand, is anything but simple and predictable in outcome. Its call for determination of "such sum as . . . shall reasonably represent the annual earning *capacity* of the injured employee" at the time of the injury, with a non-exclusive list of factors for consideration, does not, as Petitioners appeared to assume below, allow a simple division of the worker's total actual earnings in the year before the injury by 52. Rather, it calls for inquiry into and consideration of such factors as recent changes in the claimant's hourly wage rate, overtime patterns, and the *reasons for* and likelihood of recurrence in the future (absent the injury) of the work the claimant has *missed* in the preceding year – *e.g.*, atypical labor strikes, personal illnesses, previous employment injuries, family crises, etc., all of which call for adjustment of actual earnings to arrive at the worker's earning *capacity*.¹⁰ Obviously

¹⁰ See generally digest of cases at Benefits Review Board, LONGSHORE DESKBOOK 10-6a to -10g (2005) (available at http://www.dol.gov/brb/References/Reference_works/lhca/lstdesk/dbsec10.htm).

such a determination cannot be made without relatively extensive inquiry, and its outcome cannot be predicted even within reasonable limits without either extensive negotiation or litigation. The invocation of § 10(c) thus introduces uncertainty and delay, and encourages litigation, on one of the few questions that is common to every case in which a worker misses time from work as a result of an employment injury.

Thus, as a matter of balancing certainty and efficiency (not only in the administration of the Act but in employers' and their insurers' initiation of payments under it) against perfection in representation of the worker's lost earnings, it is strongly preferable to confine the § 10(c) inquiry to those cases that truly require it to avoid *serious* distortion of the earning capacity two-thirds of which is to be replaced by periodic compensation payments. A calculation under § 10(a) results in a "theoretical approximation of what a claimant could ideally have been expected to earn" if the claimant had worked "every available work day in the year." *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (citation omitted). Congress surely understood that few employees work every available workday in a year, yet when it added the five-day-worker provision to § 10(a)-(b) in 1948,¹¹ it provided the idealized multiplier of 260, making it applicable so long as the claimant has worked "*substantially* the whole of the year." It is entirely reasonable for the Ninth Circuit – and the Director, OWCP, as the Act's administrator – to take this to reflect Congress's judgment that the convenience and certainty of the § 10(a) calculus justifies some degree of

¹¹ Pub. L. No. 80-757, § 4, 62 Stat. 602, 603 (June 24, 1948), amending Longshore Act § 10(a)-(c), as amended, 33 U.S.C. § 910(a)-(c).

overcompensation. Cf. *PEPCO*, 449 U.S. at 282 (unfairness in many cases of schedule's over- or under-representation of injuries' effect on workers' future earnings justified by "interest in having [employers'] contingent liabilities identified as precisely and as early as possible").

Of course, where the claimant has *not* worked "substantially the whole of the year" because the employment is *available* only intermittently or seasonally, the application of § 10(a) or (b) would produce a wage basis with no relation not just to the worker's actual past earnings but even to his or her *ideal* earnings. The court below, however, has repeatedly recognized that the *Matulic* rule has no application to cases involving such work (*see infra* at 17), and Petitioners have never contended that Castro's work as a piledriver carpenter was of that character.

B. No Conflict

Contrary to Petitioners' assertion that the Ninth Circuit's rule conflicts with the law in the Seventh, Fifth, and Fourth Circuits (Pet. 10-12), there is no such conflict.

Although the *Matulic* majority did not respond to the assertion of the dissenting district-judge member of the panel that the majority "consciously created an inter-Circuit conflict" with *Strand v. Hansen Seaway Service*, 614 F.2d 572, 574 (7th Cir. 1980), *Matulic*, 154 F.3d at 1061 (dissenting op.); *see id.* at 1058 n.4 (majority op.) (characterizing *Strand* as "upholding application of § 910(c) when claimant worked 84% of total workdays in the measuring year"), in fact there is no conflict. *Strand* actually involved a worker at a cold-water port that only "operate[d] for thirty-six weeks of the year," 614 F.2d at

573, and was icebound for the rest of the year. As the court recited,

The record discloses that during the year prior to his injury, petitioner worked *thirty-six weeks (or 252 days)* for which he was paid \$11,431.86. Pursuant to section 10(a), the [ALJ] first calculated his average annual earnings to be \$13,608.00: 300 times [the] average daily wage of \$45.36 (\$11,431.86 divided by 252 days).

Id. at 574 (emphasis added; footnote omitted). The *Strand* court simply affirmed the Board's reversal of the ALJ's use of § 10(a) on the ground that the legislative history of the revision of § 10(a)-(c) in 1948 explicitly showed that § 10(c), rather than § 10(a) or (b), was intended to be applied to "seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek," S. REP. NO. 1315, 80TH CONG., 2D SESS., reprinted in 1948 U.S. Code Cong. & Admin. News 1979, 1982. 614 F.2d at 575. See also H.R. REP. NO. 2095, 80TH CONG., 2D SESS. 8, 14-15 (1948) (§ 10(c) applies "where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work," or "affords less than a full workyear or workweek"). Accordingly, the *Strand* court did not address the plain errors of the ALJ's calculation even under § 10(a) itself: the claimant did *not* "work" 252 days, i.e., every single day in the thirty-six weeks the port was open; assuming, since the ALJ used the multiplier for a six-day-a-week worker under § 10(a), that he worked six days a week (otherwise use of § 10(a) was contrary to its own terms), even if he did not miss a single day of available work during the season, he "worked" 216 days, not 252; that is 72 percent of the applicable § 10(a) multiplier, not (as both opinions in

Matulic uncritically calculated) 84 percent. For that reason *as well as* because *Matulic* explicitly recognized that § 10(a) is inapplicable to employment that is "seasonal or intermittent," 154 F.3d at 1058; *see also Price*, 384 F.3d at 884, there is no indication whatever that the Ninth Circuit would apply its rule to require application of § 10(a) in a case like *Strand* (much less that it would approve the ALJ's *manner* of application of § 10(a) there). Rather, it would unmistakably agree that § 10(c) must be applied on such facts.

Far from having "expressly declined to follow *Matulic*," Pet. 11, the Fifth Circuit's decision in *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601 (2004), explicitly agreed with *Matulic* that "[o]ver-compensation alone does not usually justify applying § 10(c) when § 10(a) or (b) may be applied," because overcompensation "is built into the system institutionally." *Id.* at 606 n.1 (citation omitted). Although it noted that it had not "adopted a bright-line test" like the Ninth Circuit's 75-percent maximum for resort to § 10(c) on the basis of the shortfall alone, it affirmed the Board's reversal of the ALJ's resort to § 10(c), and simple division of the claimant's part-year earnings by 52, on the ground that he "did not agree with Claimant that [§] 10(a) was designed to 'show what Claimant could earn under ideal circumstances,'" and therefore that application of § 10(a) would not be "fair"; it emphasized that the ALJ's view was contrary to Fifth Circuit law. *Id.* at 606.

And finally, Petitioners' assertion that the *Matulic* rule applied below conflicts with *Baltimore & O. R.R. v. Clark*, 59 F.2d 595, 599 (4th Cir. 1932), is likewise baseless. There "[t]he record show[ed] that the [claimant's] employment . . . was intermittent and discontinuous," *id.*,

and the 300-day multiplier that was exclusively provided by § 10(a)-(b) as then in effect (before enactment of the current version in 1948) would have produced more than double the worker's actual annual earnings. As in *Strand*, both because the work did not *offer* full-time employment *and* because the number of days the claimant had worked in the preceding year fell below the Ninth Circuit's 75-percent threshold for presumptive appropriateness of idealizing the earnings by application of § 10(a), the court below plainly would not approve application of § 10(a) on such facts any more than the Fourth Circuit did in *Clark*.

C. Inappropriate Case for Consideration of the Question

Even if there were an intercircuit conflict requiring resolution by this Court, the present case would be an inappropriate one for the Court's consideration of it. Under clear, recent (post-*Matulic*) Ninth Circuit authority, where "the exhibits failed to apportion the hours [the claimant] worked per week into days, an essential element under the § 10(a) calculation," the ALJ must apply § 10(c). *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999). This was such a case; the ALJ arrived at the figure he used as the "days worked" simply by dividing the total *hours* worked by eight (*see p. 7 supra*). Yet Petitioners neither preserved below nor have raised at any stage an objection to the ALJ's substitution, under precisely the circumstances described in *Duhagon*, of the number of full eight-hour days that Castro's *total* hours worked were *equivalent* to for the actual number of days he worked. It would be peculiarly inappropriate for this Court to review a Ninth Circuit rule that is said to be inconsistent with the law in other circuits in a case on

whose record the Ninth Circuit would agree the rule was inapplicable.

In sum, the Ninth Circuit's rule, in accordance with the administrative construction of § 10(a)-(c), reasonably implements the statutory scheme and does not conflict with the law in any other circuit; and in any event, the record of this case would not even present the question on which Petitioners seek review but for their failure to point out below the inapplicability of the Ninth Circuit's rule under its own law.

II. The Award of Compensation for Total Disability During Castro's OWCP-Approved Full-Time Retraining Program Does Not Conflict with This Court's Decision in *PEPCO* or with Any Decision of Another Court of Appeals.

A. Total Disability During Retraining in General

Three circuits have considered the administrative construction of "disability" and "total disability" as defined and used in the Longshore Act, as it applies to workers engaged in full-time vocational retraining that the OWCP has approved under § 39(c)(2) of the Act as appropriate in view of the limitations imposed by a compensable injury. All three have approved that construction: even if the worker is *otherwise* capable of securing and performing some regular employment, and hence would be only partially disabled, while he or she is engaged in retraining that practically forecloses engagement in such work, the disability is total. Pet. App. 13-15; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Brickhouse)*, 315 F.3d 286, 293-96 (4th Cir. 2002); *Abbott v. Louisiana*

Insurance Guarantee Ass'n, 40 F.3d 122, 126-28 (5th Cir. 1994) (Byron White, J.).

Petitioners say no more about *Abbott* and *Brickhouse* than that they are "at least questionable." Pet. 16. Even if such a characterization were adequate to warrant this Court's review, it is baseless. Petitioners' description of those decisions as allowing "a worker with the factual capacity to earn wages" to be paid compensation for total disability, *id.*, like their assertion that it is "undeniabl[e]" that Castro is only partially disabled because he "retains the ability to earn wages," *id.* at 14, simply ignores the basis of the administrative and judicial construction that is the basis of all three decisions. Section 2(10) of the Act, 33 U.S.C. § 902(10), defines "disability" as used in the Act generally to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"; and § 8(a), while not *defining* "permanent total disability" except as implicit in the § 2(10) definition as qualified by the word "total," provides that (except in certain specified cases in which it is presumed) it "shall be determined in accordance with the facts." There is no difference in principle between an injured worker's foreclosure from acceptance of work that is within his present capacity and qualifications, and for which he would readily be hired, because he is engaged in a time-consuming course of *physical* rehabilitation that is likely to ameliorate the future effects of the injury but that precludes such work so long as it continues, and such foreclosure resulting from a *vocational* retraining program that is likewise a consequence of the injury. *Abbott*, *Brickhouse*, and the decision below merely apply standard principles for the determination of the *availability to the disabled worker* of suitable work (*see*,

e.g., authorities cited *supra* at 2 n.3), to the special situation of a full-time retraining program determined by the OWCP to be appropriate to restore as much as reasonably possible of the worker's pre-injury earning capacity. It merely recognizes reality to say that, during such a program, the worker does *not*, as Petitioners say, "retain the ability to earn wages," since he or she could do so only by foregoing the retraining. And the strong policy favoring such restoration of earning potential strongly supports such recognition.

In any event, Petitioners have not even attempted to show, or even alleged (beyond the bare assertion at the outset of their Statement of the Case that the question is an "important" one, Pet. 2) that the OWCP approves full-time retraining programs for otherwise partially-disabled workers with anything like the frequency that would make the question of sufficient importance conceivably to warrant this Court's review. The administrative construction of "incapacity to earn" in these unusual circumstances is reasonable, supported by the policy favoring the greatest practical recovery of permanently injured workers' earning capacity, and the subject of uniform approval by the courts of appeals that have considered it.

B. Effect of the "Schedule" and *PEPCO*

Finally, Petitioners' principal contention appears to be that because Castro's injury, unlike those in *Abbott* and *Brickhouse*, was confined to a scheduled member, the decision below conflicts with this Court's decision in *PEPCO* and warrants review "even if [those cases] were correctly decided." Pet. 16-17. This argument ignores the

directly applicable, explicit qualification of the holding in *PEPCO*.

That 1980 decision concerned a worker with an injury confined to a scheduled member (as here, a partial loss of use of a leg), whose impact on his pre-injury earning capacity was far greater than would be compensated by the award provided by the schedule.¹² Despite the applicability of the schedule, the ALJ had allowed him to "elect to receive a larger recovery under § 8(c)(21) [applicable in terms to 'other cases' of permanent partial disability] measured by the actual impairment of wage-earning capacity caused by his injury," and the Board and a divided D.C. Circuit panel had affirmed. 449 U.S. at 271. This Court reversed, holding that where the schedule applies, it is mandatory and exclusive of resort to the "other cases" provision of § 8(c)(21).

The Court recognized, however, that even an injury confined to a scheduled member could produce permanent *total* disability, during which the schedule is entirely inapplicable. "[S]ince the § 8(c) schedule applies only in cases of permanent partial disability, *once it is determined that an employee is totally disabled the schedule becomes*

¹² The worker's pre-injury earnings were said to be \$332 a week; after recovery from the injury, he could earn only \$202 a week – a difference of nearly \$7,000 a year, for the rest of his working life, for which the ALJ awarded about \$4,500 a year under § 8(c)(21). His entitlement under the schedule, depending on the unresolved question of the appropriate rating of the extent of the loss of use of the leg (opined to be from 5 to 20 percent), would be a total of less than \$13,000, and perhaps as little as a quarter of that. See 449 U.S. at 283 n.25 (Opinion for the Court), 287-88 & nn.2-3 (Blackmun, J., dissenting); but see *id.* at 271 & n.2 (pre-injury earnings of \$22,000; wage-basis figure of \$332 unexplained, but actual loss about \$10,000 a year).

irrelevant," and "[w]e are concerned here solely with a case in which a scheduled injury, limited in effect to the injured part of the body, results in a permanent *partial* disability." 449 U.S. at 279 n.17, 280 n.20 (emphases added). Thus Petitioners' claim that even if an otherwise partially disabling *unscheduled* injury can be considered totally disabling during a full-time vocational rehabilitation program as held in *Abbott* and *Brickhouse*, *PEPCO* forecloses the "extension" of that rule to a scheduled injury by the court below in the present case, is inconsistent with *PEPCO* itself.

Finally, Respondent Castro is aware that Petitioners have a number of industry Amici Curiae lined up to support the petition. However impressive a display of the industry's litigation budget this provides, contrary to the appearance such support might foster, even if one were to confine the focus to Longshore Act issues, neither the *Abbott* question generally nor the applicability of its principle to otherwise scheduled-disability cases would make any realistic list of the five or ten unsettled issues most warranting this Court's attention, in terms either of the number of cases or the amounts of liability affected, or of a divergence of approach among circuits. *E.g.*, *Gros v. Fred Settoon, Inc.*, 865 So.2d 143 (La. App. 2003), *cert. denied*, 871 So.2d 352 (La.), *cert. denied*, 125 S. Ct. 408 (2004) (No. 03-1699) (direct intercircuit, and intracircuit state-versus-federal, conflicts on effect of Longshore Act award, without litigation of question whether injured worker was "crew member" excluded from Act's coverage, on subsequent pursuit of Jones Act and general-maritime-law remedies for injury, left unresolved after grant of review in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997)); *Jonathan Corp. v. Brickhouse*, 142 F.3d 217 (4th

Cir.), *cert. denied*, 525 U.S. 1040 (1998) (approach to shoreside scope of Longshore Act situs-of-injury requirement broadly conflicting with standards prevailing in other circuits). The present issue, on which there is not even claimed to be an intercircuit conflict, concerns a relatively modest amount of entitlement and liability in a relatively minuscule number of cases (those in which the OWCP approves, and the worker pursues, a full-time retraining program for a worker whose permanent disability would otherwise be confined to the schedule). The issue has no legitimate claim upon this Court's docket.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,
 JOSHUA T. GILLELAN II
Counsel of Record
 LONGSHORE CLAIMANTS'
 NATIONAL LAW CENTER
 Georgetown Place, Suite 500
 1101 30th Street, N.W.
 Washington, DC 20007
 (202) 625-8331

WILLIAM D. HOCHBERG
 NICOLE A. HANOUSEK
 222 Third Avenue North
 Edmonds, WA 98020
 (425) 744-1220

Counsel for Respondent

December 2005

No. 05-371

FILED

DEC - 9 2005

OFFICE OF THE CLERK
SUPREME COURT, U.S.

**In The
Supreme Court of the United States**

GENERAL CONSTRUCTION COMPANY, et al.,

Petitioners,

v.

ROBERT CASTRO, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF FOR AMERICAN INTERNATIONAL GROUP,
INC. AND CNA AS AMICI CURIAE IN SUPPORT OF
THE PETITION FOR WRIT OF CERTIORARI**

KEITH L. FLICKER
Counsel of Record
**FLICKER, GARELICK &
ASSOCIATES, LLP**
45 Broadway
New York, New York 10006
(212) 319-5240

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Interest of Amici Curiae.....	1
Statement of the Case.....	4
Summary of Argument.....	7
Argument.....	8
Conclusion	13

TABLE OF AUTHORITIES

	Page
CITED CASES	
<i>General Construction v. Castro</i> , 401 F.3d 963 (9th Cir. 2005)	3, 4, 6, 7, 11
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	7, 12
<i>University of Rochester v. Hartman</i> , 618 F.2d 170 (2d Cir. 1980)	1
CITED STATUTES	
Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, <i>et seq.</i>	<i>passim</i>
33 U.S.C. § 902(10)	8
33 U.S.C. § 904	2
33 U.S.C. § 906(b)	2
33 U.S.C. § 908	8, 9, 12
33 U.S.C. § 908(a)-(c), (e)	9
33 U.S.C. § 908(c)(1)-(20)	9
33 U.S.C. § 908(c)(21)	9
33 U.S.C. § 932	2
33 U.S.C. § 938	2
Defense Base Act, 42 U.S.C. § 1651, <i>et seq.</i>	1
42 U.S.C. § 1651(a)	2
42 U.S.C. § 1652(a), (b)	2

TABLE OF AUTHORITIES – Continued

	Page
OTHER MATERIALS	
Petition for Writ of Certiorari, Appendix pgs. 1-31	3
Pet. App. pg. 13.....	10, 11
Pet. App. pgs. 7, 35 and 81	10
Pet. App. pg. 13, citing <i>Louisiana Insurance Guar- anty Ass'n v. Abbott</i> , 40 F.3d 122 (5th Cir. 1995)	10

INTEREST OF AMICI CURIAE¹

Amici American International Group, Inc. ("AIG") and CNA are U.S. based private and publicly traded corporations which together, through their member companies, underwrite the majority of the federal workers compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq.*, that protects American and foreign workers employed by companies contracted by the United States government for work overseas. While wholly independent and distinct entities in aggressive competition, as leaders of the DBA underwriting industry their interests and those of the private employers and contractors that they cover merge as concerns the outcome and consequences of this case.

The DBA extends the provisions of the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, to all civilian employees working overseas for a private employer under a contract with the United States government or any of its executive departments, branches or agencies where the purpose of the contract is "to perform public work overseas, public work constituting government-related construction projects, work connected with the national defense, or employment under a service contract supporting either activity." *University of Rochester v. Hartman*, 618 F.2d 170, 176 (2d Cir. 1980). All employees working under such a contract, including Americans, foreign nationals and third country nationals are within

¹ All parties have consented to the filing of this amicus curiae brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici and its counsel made a monetary contribution to the preparation or submission of the brief.

DBA cover. Similarly, all employees of subcontractors and subordinate contractors of the DBA contract are covered.³

An employer, contractor, subcontractor and subordinate subcontractor whose employees are working under a contract within DBA cover must secure the payment of DBA compensation benefits. The failure to do so presents significant financial exposure to the entity as well as to the corporate officers, including the obligation to make the DBA benefit payments, civil fines, criminal misdemeanor charges and, critically, the loss of the protection of the statute's exclusive remedy provision enabling the employee to sue for negligence. 33 U.S.C. §§ 904, 932, 938. Further, if a subcontractor or subordinate subcontractor fails to secure DBA compensation benefits, the contractor assumes liability for that financial obligation. 33 U.S.C. § 904.

The number of employees, employers and contractors within DBA cover has increased dramatically as the U.S. government and its instrumentalities have accelerated and expanded the utilization of private interests to further its foreign policy objectives. Apart from military, security and intelligence concerns, there has been a rise in the use of private contractors to implement American objectives through overseas reconstruction, technology transfer,

³ By virtue of 42 U.S.C. § 1651(a), the LHWCA applies in all respects to DBA employees, except where modified, and provides the substantive law as to the type and level of compensation disability benefits statutorily mandated. The modifications with respect to benefits for all DBA employees concern the inapplicability of the LHWCA minimum benefits rate, 33 U.S.C. § 906(b), and with respect to alien and non-U.S. residents a differing designation of statutory dependents for purposes of the payment of death benefits. 42 U.S.C. § 1652(a)(b).

sophisticated equipment management, security trading, markets development and the spread of democratic education and values. These government contracts, as a matter of law, mandate DBA cover. Yet, clearly the overwhelming factor in the exponential growth of employees within DBA cover is the privatization of a significant number of consequential functions previously performed by the American military. Adopted as a manpower policy in the Persian Gulf War in 1991 and growing in implementation through the Balkans War and now the Wars in Iraq and Afghanistan, civilian staffing in military theaters, in security and intelligence operations and in nation building seems certain to continue. As a consequence, judicial pronouncements on the DBA are of critical concern to the private contractors who enable performance of these important American policy-implementing contracts, as well as to the DBA underwriting industry which provides the mandated cover.

Amici AIG and CNA have a vital interest in the uniform, informed and Congressionally directed determination of DBA issues. The Ninth Circuit decision in *General Construction v. Castro*, 401 F.3d 963 (9th Cir. 2005),³ in its misinterpretation of the benefits provisions of the LHWCA and, therefore, its misinterpretation of the benefits provisions of the DBA, has failed to provide either a uniform, informed or statutorily directed determination. By judicially creating a new disability classification and compensation entitlement of temporary total benefits to a claimant who voluntarily removes himself from wage earning employment by participating in a vocational

³ Reprinted in Petition for Writ of Certiorari Appendix ("Pet. App.") pgs. 1-31.

training program, and who otherwise would be limited to a permanent partial disability schedule, the Ninth Circuit has introduced a scenario inviting claim abuse and extraordinary claim expense. The consequences of the decision, including uncertainty in application across the country and potential runaway escalation in claim costs, will have an unsettling impact on premium structure and, the interest of underwriters to provide DBA cover. A reduction of DBA underwriters and a restriction of commitment to provide mandated DBA cover would be of significance to the ability of the U.S. government to effect its foreign interest through DBA overseas contracts.

STATEMENT OF THE CASE

For purposes of this brief, amici AIG and CNA adopt the detailed review and analysis set forth in the STATEMENT OF THE CASE sections contained in the Petition For Writ Of Certiorari and the amicus curiae brief of the Longshore Claims Association.

Amici do advise that the negative impact of the *Castro* decision will be of significance to the DBA underwriting industry and, consequently, the ability of DBA contractors to cause and accomplish the U.S. government interests that is their contractual obligation. Even more so than in LHWCA matters, the decision presents to interested DBA claimants an almost unfettered opportunity to unilaterally manipulate their disability classification so as to bring it within the *Castro* rule and thereby obtain temporary total benefits at the maximum compensation rate, presently at \$1,047 a week, tax free. The situation is presented on a very wide scale as a consequence of certain inequitable

results obtained by the application of the provisions of the LHWCA, a domestic compensation law envisioning a local labor market with fairly stable wage earnings, to the facts and circumstances of a typical DBA employee working under contract in Iraq, Afghanistan and a host of other countries around the world in which U.S. interests are pursued through private contractors.

It is the experience of amici AIG and CNA that the average weekly wage of an American DBA employee working in any number of war zones and hostile areas subject to terrorist or insurgent attacks throughout the world is sufficiently high so as to entitle the employee to the maximum compensation rate allowed by the statute, i.e., a weekly compensation benefit of \$1,047. Moreover, it is the common experience that the wages presently paid for DBA employment generally are 300% to 400% higher than those paid to the same individuals utilizing their skills and trades at home in the U.S. For an example, a police officer in Houston or St. Louis might earn \$45,000 domestically, but as a DBA employee performing similar functions overseas, his wages would likely be in the range of \$120,000. Similarly, a tradesman, such as a plumber, electrician or other construction skilled craftsman, will earn almost four times more overseas than he would earn in the U.S. The DBA spike in earnings, a situation that does not generally occur and was not contemplated in the LHWCA, has a profound impact on DBA claimants' disability compensation benefits entitlement arising in connection with permanent partial disability scheduled injuries and in connection with loss of wage earning capacity injuries.

Application of section 10 of the LHWCA to determine the average weekly wage or pre-injury earning capacity of a DBA claimant yields a favorable result for claimant's

benefit because the LHWCA formula does not factor out the spike in earnings overseas and accepts the overseas wages as reflective of pre-injury earning capacity and average weekly wage. A DBA claimant who suffers an injury which prevents him from returning overseas to his "regular" employment returns to the U.S., even if to his ordinary domestic wages, with a built-in significant loss of earning capacity. So too does a scheduled injury claimant who receives the benefit of the maximum compensation rate in the calculation of his permanent partial disability award.

Such claimants will assess the Ninth Circuit *Castro* rule as a windfall and an opportunity to convert their disability classification from permanent to temporary disability by volunteering to enter a Labor Department approved retraining program. These DBA claimants will receive temporary benefits at the maximum rate for the entire time period that they are in the program, which certainly will extend for years, thereby collecting tax-free compensation benefits in excess of \$52,000 a year. The ability of a claimant to manipulate his disability classification on his own accord, subject only to the Labor Department's approval of the program, and thereby, as a scheduled injury claimant, receive benefits never before available, and as a loss of earning capacity claimant increase his rate to the maximum, is a scenario waiting to be exploited.

The scenario is available to foreign workers employed under DBA contracts as they are entitled to the same benefits as American workers. While the Labor Department does not provide vocational retraining overseas, if these workers presented themselves for retraining and *Castro* benefit entitlement in the U.S., they would not be

denied temporary total benefits for the duration of their participation in the program.

SUMMARY OF ARGUMENT

Despite its protestations to the contrary, the Ninth Circuit in *Castro* created a new "disability" classification thereby establishing compensation benefits entitlement to claimants whose status never before provided such entitlement. For the first time, an LHWCA claimant was awarded temporary total disability benefits for the period of his involvement in a U.S. Department of Labor approved vocational retraining program despite the fact that his injury was one of a permanent partial disability, schedulable under the LHWCA, and he possessed a wage earning capacity after reaching maximum medical improvement. This determination rejects the express statutory scheme established by the LHWCA to provide compensation in accord with economic loss, either by assessing a loss of wage earning capacity or a defined schedule. With self-proving analysis the Ninth Circuit redefined "disability" to include the incapacity to earn wages because of participation in a vocational retraining program. In this course it rejected this Court's directives in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) ("PEPCO").

The LHWCA, by its statutory terms and conceptual underpinnings, defines disability so as to prevent a classification of temporary total disability solely as a consequence of a claimant's participation in a vocational program. The *Castro* decision creates such a classification without benefit of statutory support and without benefit of

any legislative history expressing a Congressional intent to create such a classification. Rather, the opposite is true. The plain and unambiguous statutory text of 33 U.S.C. § 908, the only provision of the LHWCA which addresses the four classifications of disability, rejects the concept that a claimant can be temporarily totally disabled while he has an earning capacity. Further, the extensive legislative history of the 1984 amendments to the LHWCA makes clear that Congress specifically addressed the issue of providing compensation benefits to claimants while undergoing vocational rehabilitation and affirmatively rejected the creation of such an entitlement.

ARGUMENT

The LHWCA and, accordingly, the DBA, provide compensation benefits only in circumstances in which an injury has resulted in economic loss to the claimant. By its clear terms the statute defines the triggering event of entitlement to benefits, i.e., disability, as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). The "incapacity" to earn must be because of the "injury." Disability under the LHWCA is an economic concept of wage loss caused by the medical consequences to the claimant of the injury.

The four classifications of disabled status wholly reflect this conceptual foundation. Permanent disability status, be it total or partial, is attained when the claimant reaches, to the extent possible, full medical recovery from the injury yet continues to suffer economic loss with either no earning capacity or a reduced one. Temporary disability

status exists, be it total or partial, when the claimant is in the process of fully recovering from the medical consequences of his injury and is expected to return to full employment, but for this period of time suffers economic loss in the form of having no earning capacity, or a reduced one. 33 U.S.C. § 908(a)-(c), (e). Permanent partial disability benefits for injuries to particular body parts enumerated in the LHWCA, such as the injury to Castro's leg, are similarly based on a measure of the claimant's economic loss and the status of his recovery from the medical consequences of the injury. 33 U.S.C. § 908(c)(1)-(20). The statute provides a schedule rating of the body part injured and the disability awarded, once the claimant has reached maximum medical recovery, and is a function of the loss of use of the member and the claimant's wages. The schedule reflects the statute's assessment of the economic loss suffered by the claimant resulting from the injury incurred.

Similarly, the express statutory language of the LHWCA used to determine the compensation for disability arising from an injury to a non-scheduled body part, i.e., the claimant's loss of wage earning capacity, references the claimant's entitlement only during "the continuance of partial disability." 33 U.S.C. § 908(c)(21). As defined, "disability" is that economic loss caused by the injury.

Nowhere in the statute is there to be found text which alters the disability classification structure of section 908 so as to sever the required causal relationship between the "incapacity to earn wages" (economic loss) "because of injury" (its medical consequences to the claimant). The Ninth Circuit, while acknowledging that the "LHWCA does not specifically provide that total disability benefits are to be awarded where a claimant shows that participation in a

rehabilitation program precludes acceptance of alternative employment" nevertheless did sever this mandated nexus by redefining the term "because of injury" to include the claimant's voluntary decision to attend a retraining program, thereby making himself unavailable for alternative employment and wages. Pet. App. pg. 13.

That Castro had a wage earning capacity at the time he was in the vocational program is undisputed. See Pet. App. pgs. 7, 35 and 81. That he had a scheduled injury entitling him to permanent partial disability compensation benefits under the statute's schedule of ratings on reaching maximum medical improvement is also undisputed. As such he had been fully compensated for his economic loss caused by the medical consequences of his injury. Yet, without any change in his medical status or wage earning capacity he was able to obtain a disability classification of temporary total disability simply by volunteering to participate in a government approved retraining program. By taking himself out of the job market for his own purposes he was able to unilaterally manipulate his wage earning capacity to zero. The Ninth Circuit, disregarding the plain meaning of section 908, accepted these maneuvers, creating a new disability classification thereby. It defended this mistaken entitlement arguing that the LHWCA's lack of an express statutory provision preventing payment of total disability benefits to Castro in this scenario was but a statutory invitation to the courts to "enunciate standards for distinguishing between the various categories of disability total and partial as well as permanent and temporary." Pet. App. pg. 13, citing *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1995). It further maintained that its new benefit entitlement promotes "[a] principal policy of the LHWCA:

the encouragement of vocational rehabilitation." Pet. App. pg. 13.

The Ninth Circuit, in grasping judicial control over the statute despite its unambiguous terms, dismissed as of no import and simply as "Congressional inaction" the extraordinarily relevant and extensive legislative history of the 1984 amendments to the LHWCA. Amici AIG and CNA refer to the thorough review of that history in Argument 111 of the brief of amicus Longshore Claims Association in support of its position that Congress has expressed its intent on the issue of whether the LHWCA should provide for the payment of total disability to a claimant during vocational rehabilitation and, moreover, whether the statute does, as presently written, provide for such payments.

In the events leading to the passage of the 1984 amendments to the LHWCA, on three separate occasions, Congress presented bills which expressly called for the payment of total disability compensation benefits during rehabilitation. These bills had been presented in direct acknowledgment that the 1972 amendments to the LHWCA did not provide such benefits and that the proposed bills would change that status. However, on the final passage of the 1984 amendments, the provision calling for total disability benefits during rehabilitation was removed and not made a part of the LHWCA which the Ninth Circuit analyzed in *Castro*. The affirmative action of Congress in removing this provision and excluding it from passage is indicative of its intent on the issue. That intent was not to permit the payment of total disability compensation benefits during a claimant's participation in retraining.

Further, Congress' actions disclose its clear understanding that without the passage of an amendment to the 1972 LHWCA, claimants under the statute were not entitled to such benefits. In that the present LHWCA, the product of the 1984 amendments, does not have such a provision, it must be the legislature's comprehension that the benefits created by the Ninth Circuit are not supported by the statute.

In addition to misreading the plain language of section 908 of the LHWCA as to the statutory structure of disability classifications and disingenuously rejecting Congress' clear expression of intent with regard to the prohibition of paying total disability compensation benefits to claimants participating in vocational retraining, the Ninth Circuit has ignored the dictates of this Court provided in the *PEPCO* case.

Castro's LHWCA claim presented itself as the typical *PEPCO* claim in that he had suffered a scheduled injury loss, had reached maximum medical improvement and had an alternative earning capacity. Under these circumstances, Castro's disability compensation benefit entitlements would be completed on the payment of his scheduled award. However, by rejecting the application of *PEPCO* to Castro's claim, the Ninth Circuit found itself free of judicial precedent sufficient to redefine Castro's disability classification and entitle him to significant and extended total disability benefits. These actions are in direct contravention of *PEPCO*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

KEITH L. FLICKER

Counsel of Record

FLICKER, GARLICK &

ASSOCIATES, LLP

45 Broadway

New York, New York 10006

(212) 319-5240

No. 05-371

FILED

DEC - 9 2005

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF LONGSHORE CLAIMS
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

ROGER A. LEVY
Counsel of Record
DEBORAH C. GARDENER
LAUGHLIN, FALBO, LEVY &
MORESI
39 Drumm Street
San Francisco, California 94111
(415) 781-6676

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF CASE.....	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	5
I. The Plain Language Of The LHWCA Does Not Allow For Temporary Total Disability Benefits To Be Paid While Claimant Undergoes Vocational Rehabilitation	5
II. The Ninth Circuit's Opinion Conflicts With Two Important Goals Of The Act: (1) Returning Claimants To Work Quickly, And (2) Maintaining The Delicate Balances And Fragile Consensus Between Business And Labor	10
III. Congress Affirmatively Excluded Language From The LHWCA That Would Have Provided For Temporary Total Disability Payments During Vocational Rehabilitation	14
IV. The Ninth Circuit Ruling In <i>Castro</i> Creates An Entitlement To Total Disability Benefits That Congress Had Expressly Removed From The Act	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994).....	15
<i>Gregory v. Norfolk Shipbuilding and Dry Dock Company</i> , 32 Ben. Rev. Bd. Serv. (MB) 264 (1998).....	19
<i>Kee v. Newport News Shipbuilding & Dry Dock Co.</i> , 33 Ben. Rev. Bd. Serv. (MB) 221 (2000)	19
<i>Louisiana Insurance Guaranty Ass'n v. Abbott</i> , 40 F.3d 122 (5th Cir. 1994).....	<i>passim</i>
<i>Metropolitan Stevedore Co. v. Rambo (Rambo I)</i> , 515 U.S. 291 (1995)	8
<i>Metropolitan Stevedore Co. v. Rambo (Rambo II)</i> , 521 U.S. 121 (1997)	8
<i>New Orleans (Gulfwide) Stevedores v. Turner</i> , 661 F.2d 1031 (5th Cir. 1981).....	4
<i>Newport News Shipbuilding & Dry Dock Co. v. Dir., OWCP (Brickhouse)</i> , 315 F.3d 286 (4th Cir. 2002)	4, 11, 19
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 258 (1980)	6, 13
<i>United States v. Wise</i> , 370 U.S. 405 (1962)	15, 16
STATUTES AND RULES	
LHWCA § 2(10), 33 U.S.C. § 902(10)	8
LHWCA § 6(b)(1), 33 U.S.C. § 906(b)(1).....	9
LHWCA § 8(a), 33 U.S.C. § 908(a)	8
LHWCA § 8(b), 33 U.S.C. § 908(b)	9

TABLE OF AUTHORITIES – Continued

	Page
LHWCA § 8(e), 33 U.S.C. § 908(e).....	6
LHWCA § 8(g), 33 U.S.C. § 908(g)	8, 9, 10
LHWCA § 39(c), 33 U.S.C. § 939(c)	9, 10
20 C.F.R. § 702.506.....	3, 11
Cal. Lab. Code § 139.5(c).....	17
Cal. Lab. Code § 4658.5.....	18
Cal. Lab. Code § 6201.....	17
Cal. Lab. Code § 6202.....	17
Cal. Lab. Code § 6204.....	17
Cal. Lab. Code § 6208.....	18

LEGISLATIVE HISTORY

H.R. 7610, 96th Cong. (1980).....	12, 14, 15
H.R. 98-570 (Nov. 18, 1983)	15, 16
H.R. Rpt. on S. 38 (Sept. 18, 1984)	11, 13, 14
Sen. Rpt. 97-498 (July 19, 1982).....	<i>passim</i>
Sen. Rpt. 98-81 (May 10, 1983).....	11, 14
Sen. Rpt. on S. 38 (Sept. 20, 1984).....	11, 13
H.R. Subcomm. on Compen., Health & Safety, Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's & Harbor Workers' Compen. Act</i> , 95th Cong. (Sept. 26, 1977).....	11, 12
H.R. Subcomm. on Compen., Health & Safety, Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's & Harbor Workers' Compen. Act</i> , 95th Cong. (May 22, 1978)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
H.R. Subcomm. on Lab., Stand., Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's & Harbor Workers' Compen. Act</i> , 96th Cong. (Nov. 13, 1979)	11, 12
H.R. Subcomm. on Lab Stand., Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's & Harbor Workers' Compen. Act</i> , 96th Cong. (Nov. 27, 1979)	12
Sen. Comm. on Lab. & Human Resources, <i>Oversight on the Longshoremen's & Harbor Workers' Compen. Act., 1980</i> , 96th Cong. (Sept. 16, 1980)	11
Sen. Subcomm. on Lab., Comm. on Lab. & Human Resources, <i>Longshoremen's & Harbor Workers' Compen. Act Amend. Of 1981</i> , 97th Cong. (June 16, 1981)	11
Cal. Workers' Compen. Inst., <i>Bulletin</i> , No. 03-17 (Sept. 26, 2003)	18

INTEREST OF AMICUS CURIAE¹

The Longshore Claims Association ("LCA") is a nonprofit national association made up of longshore employers, insurance carriers, claims professionals, risk managers, and attorneys dedicated to the proper administration of various federal workers' compensation acts including the Longshore and Harbor Workers' Compensation Act, the Jones Act, and general maritime laws. Established in 1989, the LCA's goals are: to promote claims administration expertise through educational programs, to promote cooperation with the respective authorities under all applicable acts, and to facilitate the fair handling of claims. Members of the LCA are involved in the day-to-day administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act² (hereinafter the "LHWCA" or the "Act"). They have a compelling interest in the outcome of this case, especially as it affects the rights and liabilities of the employer and employee in regards to vocational rehabilitation.

The issues set forth *General Construction v. Castro*³ are important to *amicus curiae* because the Ninth Circuit's ruling significantly increases the costs of longshore claims by requiring employers to continue total disability payments in cases where the claimant is capable of working, where work has been found to be available to the claimant, but where the claimant nonetheless chooses not to work because of his or her participation in vocational rehabilitation. We respectfully submit that the LCA's research and collective expertise provide valuable insight on the issue of

¹ All parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to this brief's preparation and submission.

² 33 U.S.C. §§ 901, *et seq.*

³ See *General Construction v. Castro*, 401 F.3d 963 (9th Cir. 2005) reprinted in Petition for Writ of Certiorari Appendix ("Pet. App.") pages 1-31.

a claimant's entitlement to temporary total disability compensation while undergoing vocational rehabilitation under the Act.

STATEMENT OF THE CASE

This case arises out of a work-related injury that is covered by the LHWCA. The LHWCA provides a road map for how disabilities are to be compensated under the Act. The Ninth Circuit, relying on opinions from the Fourth and Fifth Circuits, have created a significant detour in that roadmap that requires employers to travel an extra distance at considerably more expense.

The LHWCA provides for temporary total or temporary partial disability payments until a claimant reaches maximum medical improvement.⁴ After the injury becomes "permanent," a claimant may be eligible for permanent disability. If a claimant's injury is "scheduled," he or she receives a set payment under the schedule. Pet. App. 91-93. If a claimant's injury is "unscheduled" he or she receives continued disability payments proportionate to his or her wage-earning capacity. Pet. App. 94. In the rare instance that a claimant is found to be totally disabled because of an inability to perform any kind of work, he or she receives permanent total disability.

Robert Castro suffered a scheduled injury under Section 8(c)(2) of the LHWCA. Pet. App. 66. Mr. Castro received temporary total disability payments plus medical expenses from the date of his injury in November 20, 1998 (Pet. App. 65), until August 13, 2000, the day before he reached maximum medical improvement. Pet. App. 68 and

⁴ "Maximum medical improvement" is a term used by the courts and the Benefits Review Board to identify "the point when the injury has healed to the full extent possible." See *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (internal citations omitted). A claimant is entitled to temporary disability payments until he or she has reached maximum medical improvement. *Id.*

87. At that point, Mr. Castro was paid 48.96 weeks under the schedule. Pet. App. 79 and 87. This should have been the end of the employer's liability. Almost a year later after Mr. Castro's knee injury, the Department of Labor determined that Mr. Castro was a candidate for vocational training,⁶ and he was enrolled in a two-year hotel management program. Pet. App. 74. Mr. Castro sought additional total disability payments through the completion of the program. Pet. App. 64.

On June 20, 2001 an Administrative Law Judge ("ALJ") held that pursuant to the Fifth Circuit's decision in *Louisiana Insurance Guaranty Ass'n v. Abbott*,⁶ a claimant was entitled to temporary total disability compensation during vocational rehabilitation provided that the finder of fact weighed several factors: whether the employer had agreed to the rehabilitation plan, whether the claimant's enrollment in the program precluded employment, whether completion of the program would increase the claimant's wage-earning capacity, and whether claimant was diligent in completing the program. Pet. App. 81-82. Applying this analysis to Mr. Castro's

⁶ There has been no discussion as to why Mr. Castro did not seek vocational rehabilitation sooner, 20 C.F.R. § 702.502 states that "[a]ll injury cases which are likely to result in, or have resulted in, permanent disability, and which are of a character likely to require review by a vocational rehabilitation advisor or the staff of the Director, shall promptly be referred to such advisor by the district director or his designee having charge of the case." The Fifth Circuit in *Louisiana Insurance Guaranty Association v. Abbott* stated that "[o]nce an injury becomes permanent, an employee becomes eligible for federally-sponsored vocational rehabilitation programs." (40 F.3d 122, 126.) In fact, claimants may seek a finding from the district director on the likelihood of permanent disability, and request a referral to vocational rehabilitation, before their injuries reach maximum medical improvement. In cases where permanent disability is found "likely" the district director may then refer claimants to a vocational rehabilitation adviser while they are still receiving temporary total disability payments properly due to them under 33 U.S.C. § 908(b).

⁶ 40 F.3d 122 (5th Cir. 1994)

case, the ALJ held that Mr. Castro was entitled to temporary total disability during vocational rehabilitation. Pet. App. 83-84.

The Benefits Review Board (hereinafter the "Board") affirmed the ALJ's decision. The Board also found *Abbott* to be controlling, and noted that the recent decision of the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Dir., OWCP (Brickhouse)*, was further precedent.⁷ Pet. App. 50. The Board acknowledged that the Act did not specifically provide for total disability benefits during vocational rehabilitation and that "Congress had considered and rejected the awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right." Pet. App. 43. The Board rationalized its ruling by stating that *Abbott* did not create a new type of benefit, but merely added one more factor for the administrative law judge to consider when addressing the issue of availability of suitable alternate employment.⁸ Pet. App. 45.

The Ninth Circuit denied petition for review. Pet. App. 31. In its opinion, the Ninth Circuit states that *Abbott* and *Newport News* have "added another element to this basic test for distinguishing between total and partial disability." Pet. App. 11. The Ninth Circuit confirmed this extra "element" and set forth an entirely new set of circumstances

⁷ 315 F.3d 286 (4th Cir. 2002)

⁸ The Board was following the analysis in *Abbott* in which the Fifth Circuit, citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (1981), had applied a two-pronged test by which employers can satisfy its burden of showing suitable alternate employment. 40 F.3d at 127. Pursuant to *Turner* the courts should consider (1) what types of jobs the claimant is capable of performing or capable of being trained to do, and (2) whether there are jobs reasonably available in the community for which the claimant is able to compete and which he could realistically secure. *Id.* Applying this analysis, *Abbott* decided that a claimant who is participating in vocational rehabilitation is "unavailable" even for otherwise suitable and available employment. 40 F.3d at 127-28.

under which claimants will be entitled to total disability. Pursuant to the Ninth Circuit's holding, a claimant is now also totally disabled if he or she is capable of working, if work is available, but where claimant chooses not to work because of his or her participation in vocational rehabilitation.

SUMMARY OF THE ARGUMENT

Amicus curiae respectfully submits that:

- (1) The plain language of the Act does not support the payment of temporary total disability during vocational rehabilitation;
- (2) The Ninth Circuit's opinion conflicts with two important goals of the Act: returning claimants back to work quickly and maintaining the "fragile balance between labor and business."
- (3) Congress affirmatively excluded language from the LHWCA that would have provided for temporary total disability payments during vocational rehabilitation; and
- (4) The "case-by-case" analysis required by the Ninth Circuit before a claimant is awarded total disability during vocational rehabilitation does not distinguish those benefits from the benefits Congress purposefully excluded from the Act.

ARGUMENT

I. The Plain Language Of The LHWCA Does Not Allow For Temporary Total Disability Benefits To Be Paid While Claimant Undergoes Vocational Rehabilitation

In order to create its detour, the Ninth Circuit has resorted to twists and hairpin turns in its analysis. Nothing in the plain language of the Act supports the Ninth Circuit's holding that participation in vocational rehabilitation

renders a claimant totally disabled. The Ninth Circuit has created this detour by relying on the following premises: (1) the statute is generally silent on the scope and definition of "total disability" (addressed below); (2) providing total disability benefits to claimants during vocational rehabilitation is consistent with "a principal policy of the LHWCA" (addressed in Section II, below); (3) the legislative history of the LHWCA is dismissible because it can be characterized as "congressional inaction" (addressed in Section III, below); (4) the entitlement created by *Abbott* is distinguishable from the entitlement omitted by Congress, because *Abbott* requires the fact-finder to consider each case separately (addressed in Section IV, below); and (5) the entitlement for total disability for scheduled injuries is consistent with *Potomac Elec. Power Co. v. Dir., OWCP (PEPCO)*⁹ (addressed by Petitioners). Pet. App. 13-15.

The roadmap for determining disabilities under the LHWCA is clear and complete. The LHWCA recognizes four classifications of disability: (1) permanent total (App. 106), (2) temporary total (App. 107), (3) permanent partial (Pet. App. 91-94); and (4) temporary partial (App. 108). Permanent partial disabilities are divided into two types, "scheduled" and "unscheduled." Pet. App. 91-94. If a claimant's injury falls into one of the categories enumerated in the Section 8(c)(1)-(13) of the LHWCA, it is a "scheduled injury," and permanent partial disability is paid according to the terms of the schedule. Pet. App. 91-93. In all other cases, the injury is "unscheduled," and permanent partial disability is calculated based on an employee's wage-earning capacity. Pet. App. 94.

The LHWCA defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (App. 104) Total disability may occur as a result of either scheduled or unscheduled injuries where

⁹ 449 U.S. 263 (1980).

claimant retains no wage-earning capacity. A disability is classified as "total" when there is no suitable alternative employment available.¹⁰ In other words, where the claimant has retained no "wage earning capacity."

The LHWCA states that "wage-earning capacity" for purposes of a partial disability is determined by a claimant's "actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." Pet. App. 95. If a claimant is not working or his actual earnings do not fairly represent his capacity then the wage-earning capacity may be fixed. *Id.* However the deputy commissioner must have "due regard" for "the nature of the injury, the degree of physical impairment, his usual employment, and any other factor that may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." *Id.* In the statute, the phrase "any other factor" is modified by "that may affect his capacity to earn wages in his disabled condition," and the "effect of the disability into the future." *Id.* "Wage-earning capacity" is therefore affected by "disability" and "disability" is the "incapacity because of injury."¹¹

Instead of following this roadmap, the Ninth Circuit, relying on *Abbott* and *Newport News* has inappropriately redefined "disability" under the LHWCA. Under the Ninth Circuit's ruling, the definition of "disability" is the "incapacity because of injury or participation in ALJ approved vocational rehabilitation, to earn wages . . ." The Ninth Circuit defends this definition by stating that under the LHWCA "disability" is understood in economic terms, and

¹⁰ See also footnote 8, above.

¹¹ After Mr. Castro reached maximum medical improvement, the Administrative Law Judge made a factual finding that Mr. Castro retained wage-earning capacity. Pet. App. 81. The Benefits Review Board (Pet. App. 35), and the court of appeals (Pet. App. 7) upheld this finding.

cites to *Metro Stevedore Co. v. Rambo*¹² as support, Pet. App. 13. The LHWCA's definition of disability does allow for disability to be interpreted in economic terms when the economic incapacity is a result of an injury. This was the case in *Rambo* where the court was looking at the effects of the injury as they may naturally extend into the future and affect a claimant's future wage-earning capacity.¹³ The Ninth Circuit's expanded definition of total disability is completely unrelated to the status or possible future status of a claimant's injury. Instead, according to the Ninth Circuit, Mr. Castro's inability to work is based on his participation in vocational rehabilitation, regardless of his injury.¹⁴ The Ninth Circuit definition of "total disability" is not supported by the language of the LHWCA.

Today, the Act remains as Congress intended: void of any provision requiring employers to pay for total disability while a claimant is undergoing vocational rehabilitation. As if to underscore this point, the Act does provide for "maintenance for employees undergoing vocational rehabilitation" not to exceed \$25.00, to be paid, not by employers, but by the special fund. 33 U.S.C. § 908(g) reads:

Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for remunerative occupation and who, under the direction of the Secretary as

¹² *Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 126-27 (1997).

¹³ *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 296-98 (1995).

¹⁴ In dismissing General Construction's argument that Mr. Castro's case was distinguishable from the facts in *Abbott*, the Ninth Circuit states that the LHWCA provides for compensation "under a variety of circumstances," and cites to the language of 33 U.S.C. §§ 902(10) and 908(a). Pet. App. 16-17. However, like 33 U.S.C. § 902(10) in which the claimant's incapacity must be "because of injury," 33 U.S.C. § 908(a) also defines a claimant's incapacity in direct relationship to the injury. See App. 106.

provided by section 39(c) of this Act, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed \$25 a week. The expense shall be paid out of the special fund established in section 44.

The Ninth Circuit addressed this point in a footnote, stating that the phrase "additional compensation" indicated that Congress intended the \$25.00 to be paid in addition to total disability payments during vocational rehabilitation. Pet. App. 15. This tortured interpretation is not supported by the plain language of the Act or its legislative history. Section 6(b) of the Act sets the maximum compensation for disability at 200 percent of the applicable national average weekly wage. App. 105. The Ninth Circuit's nonsensical interpretation of the Act is that the Section 6(b) maximum is not really the maximum. The real maximum, for the new class of employees created by the Ninth Circuit, is 200 percent of the applicable national average weekly wage, plus \$25.00. According to the Ninth Circuit's interpretation of Section 8(g), only employees who participate in Department of Labor sponsored vocational rehabilitation plan are entitled to this newly created Section 6(b) "enhancement."

In the absence of any other language in the Act that supports total disability payments during vocational rehabilitation, a more reasonable interpretation is that the "compensation" referred to in section 8(g) is set forth in section 39(c), and includes "information and assistance," the furnishing of necessary "prosthetic appliances," and at the Secretary of Labor's discretion, "such amounts that may be necessary to procure such [rehabilitation] services, the money for which will be provided by the Special Fund." App. 109. "Compensation" can be anything that makes up for a loss, it does not have to be monetary. The only form of monetary compensation under sections 8(g) and 39(c) is that which must come out of the special fund.

This interpretation is supported by the legislative history of the Act. Sections 8(g) and 39(c) of the 1984 version of the Act are identical to the 1978 version sections. Commenting on the 1972 version of the Act during the congressional hearings, then Deputy Secretary of Labor, John B. Mumford stated: "Rehabilitation is not mandatory. It is an option. Our function is to serve as an intermediary . . . the statute doesn't require total disability compensation continue through the rehabilitation, but the statute does provide for small allowance." App. 34. This was apparently also the understanding of the Senate. In the Senate's version of S. 1182, Congress proposed removing section 8(g) of the act that allowed for \$25 "maintenance" and replacing it with language that provided "temporary total or partial compensation during the period of rehabilitation." App. 15-17. The bill was rejected and the 1984 version of section 8(g) retains the "maintenance" or "small allowance" and does not include temporary total disability during vocational rehabilitation.¹⁵

II. The Ninth Circuit's Opinion Conflicts With Two Important Goals Of The Act: (1) Returning Claimants To Work Quickly, And (2) Maintaining The Delicate Balances And Fragile Consensus Between Business And Labor

The Ninth Circuit defends the new benefits on the grounds that it promotes "A principal policy of the LHWCA: the encouragement of vocational rehabilitation." Pet. App. 13. To support this statement the Ninth Circuit refers to the fact that the Secretary of Labor is charged with "directing the vocational rehabilitation of permanently disabled employees and arranging for the benefits of such rehabilitation."¹⁶ *Id.* In fact, the legislative history

¹⁵ See full text of 33 U.S.C. § 908(g) in Section I of this brief.

¹⁶ 33 U.S.C. § 939(c) is set forth App. 109. Sections 39(c)(2) and 8(g), are the only two places in the LHWCA that vocational rehabilitation is
(Continued on following page)

of the LHWCA reflects that the encouragement of vocational rehabilitation was not as high a priority for Congress as were the goals of returning claimants to work quickly, and creating what congressmen referred to as "fragile consensus" between business and labor. App. 3, 10, 34-35, 48, 61-62, 70, 82-83, 87, 93-94, 97. By focusing exclusively on the policy of encouraging vocational rehabilitation, the Ninth Circuit has disrupted these two other important policies of the Act.

The legislative history of the LHWCA reflects Congress' goal of having claimants return to work quickly. At the time Congress considered the 1984 amendments, the problem of claimants prolonging the rehabilitative process in order to continue to receive the Act's generous benefits was exacerbated by the dramatic increase in number of claims filed, and the corresponding skyrocketing costs to employers. App. 72, 74-75, 81-84, 88-89. Between 1972 and 1977, LHWCA claims jumped 185% meaning that one in five longshoremen filed a claim. App. 72. By 1981 benefits had increased by 551%. App. 74. Fraud and abuse were also significant problems. App. 3, 8, 10, 12, 14, 71, 73, 76, 81-82, 93-94.

Evidence before Congress indicated that claimants were prolonging rehabilitation in order to receive benefits payments without having to work. App. 28-29, 48-49, 93-94.

mentioned. The Code of Federal Regulations defines the parameters of the Director of Labor's responsibilities regarding rehabilitation for Longshore claimants. For example 20 C.F.R. § 702.506 states: "[v]ocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially" Nothing in the Act or the Code of Federal Regulations refers to disability payments during vocational rehabilitation. In fact, the Ninth Circuit's interpretation of the Act encourages extended training for claimants and is at odds with the Director of Labor's responsibility to create "short" programs. This was the result for the claimants in *Castro*, *Abbott*, and *Newport News*.

Congress reviewed statistics that demonstrated that a significant number of claimants never completed rehabilitative programs due to failures to keep appointments, lack of interest, and a host of other problems outside of the employers control. App. 40-45, 102-103. Associate Director of Longshoremen's and Harbor Workers' Compensation, John Stocker, testified that only three claimants out of 450 that were screened for rehabilitation in the New York area actually completed training courses. App. 39. One witness stated: "the work ethic has changed in the last decade and there is no incentive, economic or otherwise, for some to return to work." App. 97. Representative Erlenborn indicated that one of the problems with the pre-1984 Act, was that its "liberal benefits" did not encourage rehabilitation and the return to work. App. 87.

Both Houses of Congress explored how the payment of temporary total disability during vocational rehabilitation would affect a claimant's motivation to return to work. One witness recommended that "[i]f the Act were to require . . . temporary total compensation during the rehabilitation effort, then it should . . . [also] require the injured worker to participate in rehabilitation." App. 103. A provision similar to this appeared in H.R. 7610, and S. 1182. App. 7, 15-17. Another witness admitted that Longshoremen had a "certain reluctance" to train for work in other fields. App. 36. It was also noted in the hearings before the House, "[during] rehabilitation . . . the possibilities of returning to work improve considerably if the compensation payments are limited in amount and/or duration to eliminate the secondary gain of being off work." App. 94. In the end, Congress excluded all provisions from the Act that would have provided temporary total disability payments to claimants during vocational rehabilitation.

A related congressional goal was balancing the concerns of business and labor. Like most workers' compensation acts, the LHWCA is remedial in that "it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled employers."¹⁷ Employees are provided with the benefit of a more certain recovery for work-related harms, but the statute was not intended to provide complete compensation for the wage-earners loss. *Id.* Congress did not create this balance easily. Representative Miller pointed out that the amendments were a product of exhaustive and thoughtful consideration and that Congress had spoken clearly in statutory language. App. 1. Congressman Miller, one of the most actively involved Congressmen, went so far as to expressly state: "we meant what we said, and said what we meant . . . [i]f it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent." *Id.* Senator Orrin Hatch pointed out that the 1984 amendments reflected a compromise between business and labor not easily reached, but fashioned through intense debate and guided by many people, and cautioned against destroying the "delicate balance" and "fragile consensus" between business and labor that Congress had strived for in drafting the LHWCA. App. 70.

¹⁷ *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 258, 281 (1980).

III. Congress Affirmatively Excluded Language From The LHWCA That Would Have Provided For Temporary Total Disability Payments During Vocational Rehabilitation

The Ninth Circuit characterized the extensive legislative history of the LHWCA as "congressional inaction." Pet. App. 14. In fact, the legislative record for the 1984 Amendments spans more than eight years, includes hearings and comments before two House of Representative subcommittees and two Senate committees, and encompasses more than 5,400 pages of testimony before the respective bodies of Congress. App. 3. Congress thoroughly considered the revisions to the Act, including several proposed amendments concerning claimant's entitlement to total disability benefits during vocational rehabilitation and the workers' compensation statutes in all 50 states. App. 6-7, 10-13, 15-17, 51-57.

In June 1980, Congressman John N. Erlenborn introduced a bill, H.R. 7610 which stated: "an employee who as a result of injury is undergoing vocational rehabilitation . . . shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation." App. 7. The bill was never enacted. In May 1981, Senator Sam Nunn and Senator Don Nickles introduced S. 1182. App. 15-17. Senate bill 1182 read very much like H.R. 7610 and specified, "an employee who as a result of an injury is undergoing vocational rehabilitation . . . shall receive continued temporary total or partial compensation during the period of rehabilitation." *Id.* However, S. 1182 also died in the House during the course of negotiations. Undeterred, the Senate introduced S. 38. App. 13. Senate bill 38 eventually became law, but not before temporary total disability benefits during vocational rehabilitation were removed. App. 20-21.

In light of the fact that Congress affirmatively removed from the LHWCA the very benefits that the Ninth Circuit now seeks to bestow, it is inaccurate for the Ninth

Circuit to characterize the legislative history of LHWCA as "congressional inaction." These bills demonstrate that Congress had moved beyond mere contemplation of allowing for temporary total disability benefits during vocational rehabilitation and had actually allotted for those benefits in the earlier proposals for the 1984 Amendments. On three occasions Congress considered the possibility of allowing a claimant to receive total and partial disability compensation during vocational rehabilitation and on three separate occasions the Majority expressly, and affirmatively, removed the provision from the Act. App. 7, 15-17, 20-21.

The Ninth Circuit's reliance on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁸ and *United States v. Wise*,¹⁹ as justification for dismissing the extensive legislative history of the LHWCA is misplaced. Pet. App. 14. In *Central Bank*, this Court rejected an argument to insert language into the statute at issue that Congress had excluded from the plain language of that statute.²⁰ This Court responded that "Congress knew how to impose aiding and abetting liability when it chose to do so . . . [i]f Congress had intended to impose aiding and abetting liability, we presume it would have used the words "aid" and "abet" in the statutory text."²¹ *Amicus curiae* agrees. An identical argument is appropriate here. Congress knew how to provide plaintiffs with total disability during vocational rehabilitation. Congress drafted three bills that had provided for those benefits. Congress also reviewed state workers' compensation legislation that had provided for those benefits. If Congress had intended to provide claimants total disability during vocational

¹⁸ 511 U.S. 164 (1994).

¹⁹ 370 U.S. 405 (1962).

²⁰ 511 U.S. at 185.

²¹ 511 U.S. at 176-77.

rehabilitation, Congress would have included the very language that it had explicitly rejected.

Unlike the facts in *Wise*, the inference that "the existing legislation already incorporated the offered change"²² cannot be made in this case. Congress was well aware that the 1972 version of the Act did not provide total disability during rehabilitation. As stated in Section I, above, Deputy Assistant Secretary, Jon. B. Mumford, testified that "the [1972 version of the] statute doesn't require total disability compensation [to] continue through the rehabilitation . . ." App. 34. The record is also clear that Congress knew that vocational rehabilitation would not be available under the 1984 version of the LHWCA, because John N. Erlenborn noted that the final version of the bill included a series of changes demanded by the majority which were in his mind "unacceptable" but nonetheless "necessary." App. 20-22. One of these changes was the elimination of benefits during vocational rehabilitation. App. 21. As a result of the provisions demanded by the Majority and concessions made by the Minority, the Majority proceeded to strike any language in the 1984 Amendments that allowed for temporary total disability benefits during vocational rehabilitation. An inference in this case, even a *Wise* one, is not warranted because the facts are clear that Congress knew that the 1984 version of the LHWCA would not contain disability benefits during vocational rehabilitation.

During its extensive hearings, Congress also reviewed the manner in which the states had structured their own workers' compensation statutes. App. 50-57. The U.S. Department of Labor provided charts specifying the manner and to what extent each state provided for total disability compensation during rehabilitation. *Id.* At the time Congress was drafting the 1984 Amendments to the Act, California had an explicit provision in its workers' compensation act entitling an employee to temporary

²² 370 U.S. at 411.

disability and then a maintenance allowance of two-thirds the employee's average weekly earnings, up to a statutory maximum. Cal. Lab. Code § 139.5(c).²³ This provision is nearly identical to the entitlement that is now available in the Fifth, Fourth, and Ninth Circuits, with one vital exception. At the time Congress reviewed the state statutes, the California statute provided extensive due process procedures for both claimants and employers including employer responsibility to notify claimant of the availability of rehabilitation;²⁴ joint responsibility of employee and employer to initiate a rehabilitation plan;²⁵ the requirement that the injured employee cooperate in carrying out the rehabilitation plan;²⁶ and the right of voluntary acceptance of

²³ Congress reviewed workers' compensation statutes from all 50 states, in 1978. At that time Cal. Lab. Code § 139.5(c) stated:

When a qualified injured worker chooses to enroll in a rehabilitation program, he shall continue to receive temporary disability indemnity payments, plus additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training, at the expense of the employer or insurance carrier, as the case may be.

In 1984, when Congress amended the LHWCA, the language of Cal. Lab. Code § 139.5(c) had not changed.

²⁴ In 1978, Section 6201 of the California Labor Code stated:

The employer or insurance carrier shall notify the injured employee of the availability of rehabilitation services in those cases where there is continuing disability of 28 days and beyond. Notification shall be made at the time the employee is paid retroactively for the first day of disability (in cases of 28 days of continuing disability or hospitalization) which has previously been uncompensated. A copy of said notification shall be forwarded to the State Department of Rehabilitation.

²⁵ In 1978, Section 6202 of the California Labor Code stated: "The initiation of a rehabilitation plan shall be the joint responsibility of the injured employee, and the employer or the insurance carrier."

²⁶ In 1978, Section 6204 of the California Labor Code stated:

An injured employee agreeing to a rehabilitation plan shall cooperate in carrying it out. On his unreasonable refusal to

(Continued on following page)

a rehabilitation program by the employer, insurance carrier, or employee.²⁷ This language of the California's workers' compensation statute had not changed when Congress enacted the 1984 Amendments to the LHWCA.²⁸ If Congress had wanted to provide temporary total disability to claimants during vocational rehabilitation, Section 39 of the Act, and its implementing regulations, would more closely resemble those state statutes that provide for this benefit. Rather than limiting the amount of compensation a claimant may receive, Section 39 would have set forth the due process procedures necessary to make the benefits constitutionally viable. Congressional deliberations never moved in that direction. Instead, the language requiring total disability during vocational rehabilitation was removed from the bills before the 1984 amendments were enacted.

IV. The Ninth Circuit Ruling In *Castro* Creates An Entitlement To Total Disability Benefits That Congress Had Expressly Removed From The Act

The Ninth Circuit attempts to distinguish the new benefits it grants claimants from the benefits Congress explicitly rejected by stating that the legislation Congress rejected would have created an entitlement to disability benefits during rehabilitation. Pet. App. 14-15. In contrast,

comply with the provisions of the rehabilitation plan, the injured employee's rights to further subsistence shall be suspended until compliance is obtained, except that the payment of temporary or permanent disability indemnity, which would be payable regardless of the rehabilitation plan, shall not be suspended.

²⁷ In 1978, Section 6208 of the California Labor Code stated: "The initiation and acceptance of a rehabilitation program shall be voluntary and not compulsory upon the employer, the insurance carrier, or the injured employee."

²⁸ In 2004, California repealed the provisions allowing for maintenance and disability replaced it with a more cost efficient supplemental job displacement benefit consisting of vouchers for vocational rehabilitation. See App. 64-66 and Cal. Lab. Code § 4658.5.

the Ninth Circuit argues, "the *Abbott* rule requires a fact-finder to consider on a case-by-case basis an injured worker's participation in a rehabilitation program as one factor in determining whether suitable alternative employment is available to the worker." *Id.* The result of the Ninth Circuit decision is that all workers will be "entitled" to this new benefit where the issue is not litigated. In the minority of cases that are referred to the ALJ for trial, the *Abbott* case by case analysis will be applied. The Ninth Circuit refers to two cases as examples of circumstances in which a claimant would not receive total disability during vocational rehabilitation. Pet. App. 15. In *Kee v. Newport News Shipbuilding & Dry Dock Co.*, the claimant submitted no evidence that he was unable to work during his vocational rehabilitation program.²⁹ In *Gregory v. Norfolk Shipbuilding and Dry Dock Company* the ALJ inferred that claimant was capable of working during vocational rehabilitation because she actually was working during vocational rehabilitation.³⁰ According to these cases, the only circumstances in which a claimant will be denied total disability payments during vocational rehabilitation under *Abbott*, *Newport News*, and *Castro* are those where either the claimant either presents no evidence whatsoever to indicate that he or she cannot work, or where claimant actually does work. This presents obvious disincentives for claimants to return to work.

The award of virtually all benefits under the LHWCA is subject to some form of fact-finding process, and, in that sense, the total disability entitlement during vocational rehabilitation judicially created by the Ninth Circuit is no different than any other benefit already set forth in the LHWCA. Claimants have an extremely low hurdle to jump to meet the *Abbott* criteria. The Ninth Circuit's characterization of *Abbott* as providing different benefits than those

²⁹ 33 Ben. Rev. Bd. Serv. (MB) 221 (2000).

³⁰ 32 Ben. Rev. Bd. Serv. (MB) 264 (1998).

explicitly rejected by the legislature because *Abbott* requires an analysis on a "case-by-case" basis, is a ruse. The result is identical. In the vast majority of cases, claimants will be entitled to the benefits that Congress explicitly rejected when drafting the LHWCA.

CONCLUSION

The Ninth Circuit has created a significant detour in the roadmap set out for the compensation of disabilities under the LHWCA. This detour is unsupported by the plain language of the Act or by the Act's legislative history. The detour upsets the delicate balances Congress sought to achieve by giving claimants a virtual entitlement to total disability benefits during vocational rehabilitation: benefits which Congress explicitly withheld in order to achieve the necessary balances. For the reasons set forth above, the Court should grant General Construction Company and Liberty Northwest Insurance Corp.'s Petition for Writ of Certiorari, and reverse or vacate that portion of the Ninth Circuit's opinion that grants claimants total disability benefits during vocational rehabilitation under the LHWCA.

Respectfully submitted,

ROGER A. LEVY

Counsel of Record

DEBORAH C. GARDENER

LAUGHLIN, FALBO, LEVY & MORESI

39 Drumm Street

San Francisco, California 94111

(415) 781-6676

APPENDIX

TABLE OF CONTENTS

	Page
H.R. Rpt. on S. 38 (Sept. 18, 1984)	App. 1
H.R. 7610, 96th Cong. (1980).....	App. 5
Sen. Rpt. 98-81 (May 10, 1983).....	App. 8
Sen. Rpt. 97-498 (July 19, 1982)	App. 14
H.R. 98-570 (Nov. 18, 1983).....	App. 18
H.R. Subcomm. on Compen., Health & Safety, Comm. on Educ. & Lab., <i>Oversight Hearings on the Long- shoremen's & Harbor Workers' Compen. Act</i> , 95th Cong. (May 22, 1978).....	App. 23
Cal. Workers' Compen. Inst., <i>Bulletin</i> , No. 03-17 (Sept. 26, 2003).....	App. 64
Sen. Rpt. on S. 38 (Sept. 20, 1984).....	App. 67
Sen. Subcomm. on Lab., Comm. on Lab. & Human Resources, <i>Longshoremen's & Harbor Workers' Compen. Act Amend. Of 1981</i> , 97th Cong. (June 16, 1981)	App. 72
Sen. Comm. on Lab. & Human Resources, <i>Oversight on the Longshoremen's & Harbor Workers' Compen. Act</i> , 1980, 96th Cong. (Sept. 16, 1980)	App. 77
H.R. Subcomm. on Lab., Stand., Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's & Harbor Workers' Compen. Act</i> , 96th Cong. (Nov. 13, 1979)	App. 85

APPENDIX
TABLE OF CONTENTS – Continued

	Page
H.R. Subcomm. on Compen., Health & Safety, Comm. on Educ. & Lab., <i>Oversight Hearings on the Long-</i> <i>shoremen's & Harbor Workers' Compen. Act</i> , 95th Cong. (Sept. 26, 1977).....	App. 95
H.R. Subcomm. on Lab Stand., Comm. on Educ. & Lab., <i>Oversight Hearings on the Longshoremen's</i> <i>& Harbor Workers' Compen. Act</i> , 96th Cong. (Nov. 27, 1979)	App. 100
LHWCA U.S.C. § 902(10)	App. 104
LHWCA U.S.C. § 906(b)(1).....	App. 105
LHWCA U.S.C. § 908(a)	App. 106
LHWCA U.S.C. § 908(b)	App. 107
LHWCA U.S.C. § 908(e)	App. 108
LHWCA U.S.C. § 939(c)	App. 109

**HOUSE REPORT ON CONFERENCE REPORT
ON S. 38, LONGSHOREMEN'S AND
HARBOR WORKER'S COMPENSATION ACT
AMENDMENTS OF 1984 (SEPTEMBER 18, 1984)**

**CONFERENCE REPORT ON S. 38, LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT
AMENDMENTS OF 1984**

Mr. MILLER of California, Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, it has been 4 years since the Subcommittee on Labor Standards began its work on legislation to amend the "Longshoremen and Harbor Workers' Compensation Act." The conference report before us today is the product of thorough, exhaustive, and thoughtful consideration.

This is a consensus report. It received the unanimous support of every member of the conference committee, from both parties and every ideology. To make certain that there is no grounds for misinterpretation or abuse, either by those charged with enforcing the law, the courts, or others, we have spoken very clearly both in the statutory language and in the statement of managers.

We meant what we said, and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent.

This is a complicated bill but its underlying principle is really quite simple. Some employers and employees who were never supposed to be covered by the Longshore Act

App. 2

have been included in its coverage; some of the benefits have been excessive.

By the same token, individuals who should receive Longshore Act compensation, medical assistance, death and survivor benefits have found the law and the courts unresponsive to their legitimate claims for assistance, as documented in yesterday's Washington Post.

* * *

Mr. Speaker, there are numerous other provisions of this conference report which will have a meritorious effect on the operation of the Longshore Program, and will serve the best interests of employers and employees alike.

I am very grateful for the cooperation and support offered this legislation by all of my colleagues on the conference committee, which unanimously approved this report.

I am also pleased that associations representing shipyards, marinas, and other employers, insurance associations, and the AFL-CIO have enthusiastically endorsed this legislation.

After 4 years of work, the time has come to make this important legislation law. I urge my colleagues to suspend the rules and pass the conference report on S. 38.

Mr. ERLNBORN. Mr. Speaker, I rise in support of the conference report.

This legislation marks the culmination of an extraordinarily difficult effort to amend, the Longshoremen's and Harbor Workers' Compensation Act, probably the worst workers' compensation law in the country. It corrects

App. 3

manifold inequities and abuses stemming from Congress' hastily considered and ill-advised 1972 amendments.

Rarely, if ever, in my 28 years' experience as a legislator has the record of abuse and inequity been so voluminous, so overwhelming and efforts to remedy these abuses and inequities been so often exasperating, frustrating, and protracted. The hearing record extends over 8 years, encompassing two House subcommittees, two Senate committees, and seven volumes of testimony totaling 5,470 pages.

Today, Mr. Speaker, we write the final chapter to the dismal and destructive legacy of the 1972 amendments. Those amendments may have provided new protections to injured workers, but at an unacceptably high cost to employers, and insurers and thereby, further eroded the economic competitiveness of the maritime industry.

Today, unlike in 1972, when the amendments were crafted in the dead of night by Senate staff, the House has before it a balanced product, one which retains important and needed protections for injured workers and their families, tempered by added employer, insurer, and Labor Department controls which will assure workers' compensation benefits to those deserving of them while also affording the means in better control program costs and abuse.

I commend, first, the gentleman from California [Mr. MILLER] for agreeing on the need for changes and for persevering to the end. I also want to recognize the unflagging efforts of the Longshore Action Committee - the employer and insurer coalition of over 70 members which persisted, often in the face of adversity, and which has withstood the test of disappointment. That such a group

App. 4

could remain unified for so long, I believe, is a testament to the rightness of their cause.

I would be remiss, however, if I failed to mention the efforts of Senators NICHLES and HATCH, and their staffs, who in early 1981 began the process we complete today, and of former Deputy Under Secretary of Labor, Robert Collyer, and his staff, who focused a young administration on the necessity for revamping the act.

With enactment of these longshore amendments only the Federal Employers' Compensation Act [FECA] remains among the Department of Labor's so-called terribly trilogy of workers' compensation programs still untouched.

In 1981 Congress amended the Black Lung Benefits and Revenue Acts to address the burgeoning black lung disability trust fund deficit and made several cosmetic changes in entitlement. Much more needs to be done but, at least, a first, if faint-hearted, attempt has been made.

Today, Congress corrects the abysmal record of the 1972 Longshore Act Amendments. Next year, it should remedy the 1974 FECA amendments which have driven annual program costs to over \$1 billion. The troubled FECA program has been a frequent subject of comment by the General Accounting Office and the Department's Inspector General.

So, I would encourage the gentleman from California to move ahead.

* * *

**OVERSIGHT HEARINGS ON THE
LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT
Supplement**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON LABOR STANDARDS
OF THE
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION

HEARINGS HELD IN WASHINGTON, D.C.,
ON NOVEMBER 13, 14, 15, 27; AND DECEMBER 6, 1979

Printed for the use of the Committee
on Education and Labor
U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1980

INTRODUCTION

This is a supplement to the subcommittee's oversight hearings in the 96th Congress on the Longshoremen's and Harbor Workers' Compensation Act which are available in a separate volume. The following material submitted by Hon. John N. Erlenborn, a Representative in Congress

from the State of Illinois, was inadvertently omitted from the original hearing record.

(III)

96TH CONGRESS' H.R. 7610
2d SESSION

To amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such Act, to provide for certification of physicians eligible to provide medical care to workers covered by such Act, to provide for an attorney to serve as the representative of the special fund established under such Act, to establish a Benefits Review Board the members of which are appointed by the President, to establish an advisory committee to evaluate the manner in which the provisions of the Act are carried out, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 1980

Mr. ERLNBORN (for himself, Mr. EDWARDS of Alabama, Mr. EDWARDS of Oklahoma, Mr. GOODLING, Mr. MCCLOSHEY, and Mr. BUCHANAN) introduced the following bill; which was referred to the Committee on Education and Labor

App. 7

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act . . .

* * *

(g) Subsections (g) through (i) of section 8 of the Act are amended to read as follows:

"(g) COMPENSATION FOR EMPLOYEES UNDERGOING VOCATIONAL REHABILITATION. - An employee who as a result of injury is undergoing vocational rehabilitation for remunerative employment under the direction of the deputy commissioner as provided by section 39(c) of this Act, or with the approval of the employer, shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation. No award for permanent disability may be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed. If an employee unreasonably refuses to undergo vocational rehabilitation, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of such refusal.

* * *

LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT AMENDMENTS OF 1983

May 10 (legislative day, May 9), 1983. –
Ordered to be printed

Mr. Hatch, from the Committee on Labor and
Human Resources, submitted the following

REPORT

[To accompany S. 38]

The Committee on Labor and Human Resources, to which was referred the bill (S. 38) to amend the Longshoremen's and Harbor Workers' Compensation Act in order to improve the administration of the Act, to reduce incentives for fraud and abuse, to assure immediate compensation benefits and competent medical treatment for injured employees, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill as amended do pass.

CONTENTS

	Page
I. Committee Amendment as Reported	1
II. Summary of the Bill	17
III. Background and Need for Legislation	18
IV. History of S. 38.....	20
V. Hearing.....	22
VI. Committee Views on S. 38.....	24
VII. Cost Estimate.....	38
VIII. Regulatory Impact.....	40
IX. Tabulation of Votes Cast in Committee	41
X. Section-by-Section Analysis.....	41
XI. Changes in Existing Law	45

I. COMMITTEE AMENDMENT AS REPORTED

The bill, which was reported with committee amendment, provides:

* * *

Beginning in 1977, the respective labor committees of the Senate and the House have conducted series of oversight hearings on the LHWCA and on the impact of the 1972 amendments. The Subcommittee on Compensation, Health and Safety, of the House Committee on Education and Labor held eight days of hearings during the first session of the 95th Congress and nine days of hearings in the second session. Hearings continued in both the House and the Senate during the 96th Congress. Employers, insurance carriers, unions, and employee representatives presented varying views. Employers and carriers expressed

concern over unclear jurisdiction, benefit levels, unrelated death benefits, annual adjustments in compensation, the Special Fund's growing liability, and the timely administration and adjudication of claims. Employee representatives expressed overall support for the current law but indicated concern over inadequate administration by the Department of Labor.

It is clear from the abundant record developed at the oversight hearings that a pressing need exists to revise portions of the act. The courts and agencies have found coverage to exist in situations which are not warranted. Features of the benefit structure have made it difficult to calculate future costs, and in some cases made the act uninsurable. Claims processing features have made the act susceptible to fraud and abuse. Finally, the act does not contain sufficient incentives for injured workers to seek rehabilitation and to return to work.

IV. HISTORY OF S. 38

A. The 97th Congress

At the beginning of the 97th Congress, the Permanent Subcommittee on Investigations of the Senate Committee on governmental Affairs held six days of hearings on waterfront corruption and influence of organized crime in a number of east and gulf coast ports. The hearings were the culmination of an investigation commenced the previous year by Senator Nunn and the Department Justice's Operation UNIRAC.

Soon after the conclusion of the Permanent Subcommittee Investigations hearings, Senators Nickles and Nunn on May 14, 1981 introduced the comprehensive Longshoremen's and Harbor Workers' Compensation

reform bill S. 1182. This Committee's Subcommittee on Labor held four days of hearings on S. 1182 and developed a hearing record of 1241 pages. Interested parties from labor, management, and government presented their views.

The following criticisms emerged from these hearings.

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are state of uncertainty as to the status of their employees working locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and then dies from any cause; his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future, annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maximum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher

benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination of a claimant at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Eighth. Waste, fraud, and abuse: During the course of the hearings before the Permanent Subcommittee on Investigations as well as this committee's consideration of the bill, testimony was received concerning the potential for abuse of this act. It has not been clearly established that, in certain instances, the provisions of the act have been abused by corrupt individuals so that corrective action to eliminate this potential is necessary.

On October 28, 1981, the Labor Subcommittee reported to the full committee the bill with an amendment in the nature of a substitute. On December 15, 1981, February 9, and May 25, 1982, the full committee met in executive session to consider the bill. An amendment in the nature of a substitute was adopted and ordered reported by unanimous vote. The committee amendment, as explained below, addresses each of the above concerns.

On July 27, 1982, S. 1182 passed the Senate by a voice vote. The bill, upon delivery to the other body, was referred to the House Education and Labor Committee. On August 17, the Labor Standards Subcommittee conducted a hearing. Negotiations on a compromise bill began immediately thereafter and ensued until the end of the second session. A final compromise did not emerge.

B. The 98th Congress

S. 38 was introduced on January 26, 1983. It embodies the provisions of S. 1182 as passed by the Senate in the 97th Congress. The bill was reported by the Labor Subcommittee on April 11 to the full committee. On May 4, the committee agreed to report the bill.

V. HEARINGS

A. The 97th Congress

Public hearings on S. 1182 were conducted by the Subcommittee on Labor on June 16, 17, 23, and October 5, 1981.

* * *

S. Rep. No. 97-498 at p.____(1982)

Calendar No. 710

97TH CONGRESS
Second Session

SENATE

REPORT
No. 97-498

**LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT AMENDMENTS
OF 1982**

**JULY 19 (legislative day, JULY 12), 1982. -
Ordered to be printed**

**Mr. HATCH, from the Committee on Labor and
Human Resources, submitted the following**

REPORT

[To accompany S. 1182]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1182) to amend the Longshoreman's and Harbor Workers' Compensation Act in order to improve the administration of the Act, to reduce incentives for fraud and abuse, to assure immediate compensation benefits and competent medical treatment for injured employees, and for other purposes, having considered the same, reports favorably thereon, with an amendment and an amendment to the title, and recommends that the bill as amended do pass.

CONTENTS

	Page
I. Committee Amendment as Reported-----	1
II. Summary of the Bill-----	19
III. Background and Need for Legislation-----	20
IV. History of S. 1182-----	22
V. Hearing-----	23
VI. Committee Views on S. 1182-----	25
VII. Cost Estimate-----	38
VIII. Regulatory Impact-----	40
IX. Tabulation of Votes Cast in Committee-----	41
X. Section-by-Section Analysis-----	41
XI. Changes in Existing Law-----	45

I. COMMITTEE AMENDMENT AS REPORTED

The Committee amendment provides:

That (a) this Act may be cited as the "Long-shoremen's and Harbor Workers' Compensation Act Amendments of 1982".

* * *

(g) Subsections (g) through (i) of section 8 are amended to read as follows:

"(g) Compensation for employees undergoing vocational rehabilitation:

"(1) An employee who as a result of an injury is undergoing vocational rehabilitation for remunerative employment under the supervision of the deputy commissioner, pursuant to section 39(c), or with the approval of the employer, shall receive continued temporary total or partial compensation during the period of rehabilitation.

"(2) An award for permanent disability may not be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed.

"(3) If an employee unreasonably refuses to undergo vocational rehabilitation or to participate in a reasonable plan offered and financed by the employer to return the injured employee to work, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of the refusal.

* * *

(g) [Maintenance] *Compensation* for employees undergoing vocation rehabilitation: [An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 39(c) of this Act, is being rendered fit to engage in remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed \$25 a week. The expense shall be paid out of the special fund established in section 44.]

(1) *An employee who as a result of an injury is undergoing vocational rehabilitation for remunerative employment under the supervision of the deputy commissioner, pursuant to section 39(c), or with the approval of the employer, shall receive continued temporary total or partial compensation during the period of rehabilitation.*

(2) *An award for permanent disability may not be entered before the deputy commissioner determines, or the*

employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed.

(3) If an employee unreasonably refuses to undergo vocational rehabilitation or to participate in a reasonable plan offered and financed by the employer to return the injured employee to work, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of the refusal.

* * *

LEGISLATIVE HISTORY
P.L. 98-426

**LONGSHORE AND HARBOR WORKERS'
COMPENSATION ACT AMENDMENTS OF 1984**

P.L. 98-426, see page 98 Stat. 1639

Senate Report (Labor and Human
Resources Committee)

No. 98-81, May 10, 1983 [To accompany S. 38]

House Report (Education and Labor Committee)
No. 98-570 (I and II). Nov. 18, 1983, Feb. 7, 1984
[To accompany S. 38]

House Conference Report No. 98-1027, Sept. 14, 1984
[To accompany S. 38]

Cong. Record Vol. 129 (1983)

Cong. Record Vol. 130 (1984)

DATES OF CONSIDERATION AND PASSAGE

Senate June 16, 1983; September 20, 1984

House April 10, September 18, 1984

The House Report (Part I, this page,
Part II, page 2768) and the House Conference
Report (page 2771) are set out.

HOUSE REPORT NO. 98-570, Part I

[page 1]

The Committee on Education and Labor, to whom was referred the bill (S. 38) entitled the "Longshoremen's and Harbor Workers' Compensation Act", having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

* * *

BACKGROUND AND HISTORY OF LEGISLATION

The Longshoremen's and Harbor Workers' Compensation Act (herein called, "the Longshore Act") was last amended in 1972. These current amendments were first proposed in the 97th Congress. A bill to amend the Longshore Act (H.R. 25) was introduced by Mr. Erlenborn. The Senate bill, S. 1182, was introduced on May 14, 1981, and was the subject of four days of legislative hearings in the Committee on Labor and Human Resources in the Senate. That bill was reported by the Senate Committee on July 19, 1982, and was passed by the Senate on July 27, 1982. When received by the House of Representatives, the bill was referred to the Committee on Education and Labor, and hearings were held on the measure in the Subcommittee on Labor Standards on August 17, 1982. The Labor Standards Subcommittee, working with affected constituencies, developed extensive revisions to the bill, but was unable to

* * *

[page 83]

INDIVIDUAL VIEWS OF HON. JOHN N. ERLNBORN

Unfortunately, the Committee hurriedly approved this legislation in the final days of the first session when it had had all year to act. We are confronted with legislation substantially altered in many important ways from the bill agreed upon in the 97th Congress. Moreover, in order to move this bill quickly to conference with the Senate we are likely to proceed under suspension of the rules, barring Floor amendments to this comprehensive and controversial bill, when it would have been preferable to consider

the legislation under the regular rules so the House could work its will.

This perspective requires an explanation. In July 1982 the Senate passed S. 1182, a comprehensive revision to the Longshoremen's and Harbor Workers' Compensation Act and, itself, the product of long, arduous negotiations. House consideration should have been expeditious but organized labor, which had agreed to the Senate bill, inexplicably withdrew its support. They, as well as the gentleman from California (Mr. Miller), raised innumerable objections to the Senate bill. Issues which had been resolved were reopened and new issues sprouted like June weeds. Nevertheless, an agreement was reached in December 1982 by myself, Mr. Miller, and the Senate principals only to have our late colleague, Phillip Burton, object. The agreement was stillborn.

This past June, the Senate in effect re-passed S. 1182 - as S. 38. We were told the Committee would soon turn its attention to Longshore. But the December 1982 Agreement deemed to no longer enjoy the support of the Majority although we in the Minority were willing to abide by it.

There are numerous differences between this bill and the agreement of December 1982. The Minority, nevertheless, has negotiated in good faith with the Majority over this latest series of changes - to no avail. These changes by the Majority include:

- (1) Narrowing the scope of the exemption for individuals employed by a restaurant, museum, retail outlet, or marina;

(2) Striking the exemption for certain land-based commercial barge (and sundry vessels) fabrication operations;

(3) Striking statutory provision for apportioning hearing loss claims between (and among) employers;

(4) Eliminating the Conversation Committee intended to protect the assets of the Special Fund and increasing the employers' retention period to six years;

(5) Eliminating amendments concerning vocational rehabilitation which assured continued payment of benefits during rehabilitation (with a reduction for earnings), prevented premature entry of permanent total disability awards, and mandated vocational rehabilitation;

(6) Striking codification of the Supreme Court's decision holding the mere existence of a physical impairment as insufficient to trigger the Act's presumption of coverage;

(7) Altering the basis on which benefits are determined in occupational disease cases, inspired by the 9th Circuit Court of Appeals decision in *Todd Shipyards v. Black*, 706 F.2d 1512 (9th Cir. 1983), which raises questions concerning the ability of insurers and self-insurers adequately to reserve claims thereunder and the eligibility for benefits of retirees without a demonstrated loss in wage earning capacity; and

(8) Eliminating terms of office (and removal only for cause) for members of the Benefits Review Board, and thus laying the foundation, so its proponents hope, for politicizing the Board's membership after the 1984 elections.

These alterations are unacceptable. Unacceptable, as well, is the gloss the Majority's report places on the bill, incorporating interpretations which either were never agreed upon or even discussed. For example, the report misstates my understanding of the scope of certain exemptions, raises questions about the effect of the Committee bill's language concerning exclusivity, and suggests an unduly restrictive interpretation of the Secretary's authority to debar medical providers and claims representatives. Neither does it reflect our agreed interpretation of changes in the statute of limitations for claims filings. This failure underscores my concern about the Majority's unstated intent, through its occupational disease benefit changes, to assure benefits for retirees who are voluntarily out of the workforce and do not experience any loss in wage-earning capacity.

However, I firmly believe amendments to the Act are necessary and long overdue and, therefore, intend to support S. 38 so that these and other differences between House and Senate versions can be addressed in conference.

JOHN N. ERLNBORN.

**OVERSIGHT HEARINGS ON THE
LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT
Part 2**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON COMPENSATION,
HEALTH AND SAFETY
OF THE
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
SECOND SESSION

HEARINGS HELD IN WASHINGTON, D.C.,
ON APRIL 18, MAY 2, 3, 10, 22; JUNE 13;
JULY 12, 26; SEPTEMBER 19, 1978

Printed for the use of the Committee
on Education and Labor

* * *

**OVERSIGHT HEARINGS ON THE LONGSHORE-
MEN'S AND HARBOR WORKERS' COMPENSA-
TION ACT**

Part 2

MONDAY, MAY 22, 1978

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR,
*Washington, D.C.***

The committee met, pursuant to recess, at 9:35 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Erlenborn, and Miller.

Staff present: Paul F. Dwyer, counsel to the subcommittee; Edith C. Baum, minority counsel for labor.

Mr. GAYDOS. The Subcommittee on Compensation, Health and Safety will come to order.

This is, for the record, a continuation of oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act. This morning the Chair, in behalf of the subcommittee, is pleased to welcome back the Assistant Secretary of Labor, Donald E. Elisburg.

You may proceed in the manner you deem best.

**STATEMENT OF HON. DONALD E. ELISBURG,
ASSISTANT SECRETARY OF LABOR FOR
EMPLOYMENT STANDARDS, ACCOMPANIED
BY GEORGE LILLY, COUNSEL, SOLICITOR'S OF-
FICE; JOHN STOCKER, ASSOCIATE DIRECTOR,
LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION; JOHN B. MUMFORD, DEPUTY
ASSISTANT SECRETARY; AND RALPH M. HART-
MAN, DIRECTOR, OFFICE OF WORKERS' COM-
PENSATION PROGRAMS**

Mr. ELISBURG. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the subcommittee:

I welcome this opportunity to appear before you today to discuss the administration of the Longshoremen's and Harbor Workers' Compensation Act (the Act). I would like to begin by describing some of the improvements that have been made in the administration of the Longshore program during the last year and a half. In

* * *

a whole ranks high in the incidence of injury. Consequently, the insurance coverage rates are relatively high for Longshore coverage. But when employers report sudden and continuing increases in their insurance premiums something is wrong. Let me give you some examples of increases in premiums for Longshore Act insurance since the 1972 amendments. Stevedoring occupations are among the highest to insure. Prior to the amendments, the rate for general stevedoring in the West Gulf area was \$21 per \$100 of payroll. Now the rate is 42, an increase of 100 percent. In New York, the general stevedoring rate has increased from \$29 prior to 1972 to 65 now, representing a

124 percent increase. We realize that the situation is critical and could threaten the viability of the Act.

A workers' compensation program cannot work unless insurance is available to all covered employers at affordable premiums. However, the McCarran Act of 1945 (15 U.S.C. 11) prohibits the Federal Government from any control [illegible] rate regulation, or even requiring authorized insurance companies to provide coverage to all those who require it. [Illegible] view of the critical situation, however, we have initiated a study of insurance problems under the Act. The employment Standards Administration has selected a private search firm, Cooper and Company of Stamford, Connecticut, conduct an in-depth study of insurance rates and availability under this Act. The study will include an extensive survey of employers and insurance companies writing Longshore Act coverage. It is expected to be completed by this coming July and should help us ascertain the facts and extent of the Longshore Act insurance problem. The results of the study may be the basis for recommending corrective actions which employers, insurance carriers, or possibly OWCP might take. One thing that the maritime industry can do is to take further safety measures that will cut down on the number of serious injuries and deaths. Such action would be a big step toward a cutback to insurance costs.

The Department has taken steps which should have a beneficial effect upon insurance rates, while at the same time making a good deal of progress in implementing the increased benefits and protections for workers required by the 1972 amendments to the Longshore Act. Through the national training course and accountability reviews, we

have gone a long way towards achieving uniform procedures and consistency in claims adjudication throughout the country. In addition, we have established an investigative division within OWCP for pursuing possible fraudulent claims. In the next several months, the unit will become part of the newly created office of Special Investigations in the Department which was created by Secretary of Labor Marshall to investigate allegations of fraud and abuse in all programs administered by the Department.

* * *

The point I want to make generally, Mr. Chairman, about those kinds of issues, is that those amendments represented an improvement in the case of the individual injured worker. The question of whether to change any of those provisions really presents a great possibility of moving backwards with respect to the future of workers' compensation protection for many workers in the country. I know there are individual situations the subcommittee would like to discuss with us, but I wanted to give you a broad picture as to how we feel about the process of having improved benefits under the statute.

Mr. GAYDOS. Are you saying that the National Commission in its study of workers' compensation statutes approved of the landward extension under the Longshore Act?

Mr. ELISBURG. No. I don't think I talked about the Longshore Act at all. I was talking about the increase in benefits, the indexing, and those kinds of matters.

The question of coverage, I think, as Mr. Hartman points out, has been focused to the Congress by the Supreme Court about 1969 in a decision where it said the

matter of where the water's edge is was one that Congress, itself, would probably have to judge.

Mr. GAYDOS. We are talking about court decisions; is that right?

Mr. ELISBURG. In that issue. That's an issue of coverage.

With that, Mr. Chairman, that's really my summary of where we are. We would be pleased to respond to any questions the subcommittee has.

Mr. GAYDOS. May I get an example, for the record. We talked about rehabilitation in the shipping industry. What does that constitute? What is it made up of, and what form does it take?

Mr. ELISBURG. Mr. Stocker.

Mr. STOCKER. Mr. Chairman, all cases in which an injured employee is disabled for more than 2 months are referred to a rehabilitation specialist in our office for review. That person will fall -

Mr. GAYDOS. Take a welder, for example, someone with a specific trade or profession. Or take an unskilled person. How does this rehabilitation work?

We keep hearing about rehabilitation in this area and other areas. We hear that we can retrain people if we run this program properly and efficiently, and then we won't have to worry about compensation payments, because they will be back in the work force.

There is a serious doubt as to whether that concept, in a practical manner, can be applied. Very few people are

being rehabilitated. They find it better not to be rehabilitated. That is one of the accusations.

I am asking you how this works under the Act, and as a practical matter, will it produce results which will eventually solve the problem?

Can you give us an example of how it works?

Mr. STOCKER. There are two aspects of rehabilitation: We look at what can be done medically for the man in an active and aggressive way, versus merely palliative treatment. That is the first thing the specialists will consider, a positive approach to treatment.

Mr. GAYDOS. How many specialists are there?

Mr. STOCKER. We have nine scattered throughout the country.

Mr. GAYDOS. That man's case will find its way to one of these specialists?

Mr. STOCKER. It will be referred by the claims examiner or on the filing of a special rehabilitation form by the insurance carrier. They are required to file that 60 days after a man becomes totally disabled.

The specialist will contact the disabled worker at the appropriate time and try to engage him or her in becoming interested in what might be done to either return the person to the job they were doing before the accident, to place them in another type of employment they could do in their disabled condition, or to train them for some other type of work.

We have had some examples in the District of Columbia, where the present program has been operating since 1971.

We had an example of a young man who attended law school under the sponsorship of this program and was able to become a lawyer.

We have had cases -

Mr. GAYDOS. You are not citing that as a typical case?

Mr. STOCKER. It's not a typical case.

We had a laborer who went into the hairdressing business.

Mr. GAYDOS. Is that progressive or regressive?

Mr. STOCKER. I will defer answering that.

I suppose the cases where a worker goes to college are not the typical cases.

We have a former Redskin football player being rehabilitated in a business administration program. He is now in the State of Oregon, which is his home.

I think in more instances than not, we help people return to their own job or to assist them in placement in another job they can do without too much training. Where training is necessary, though, we counsel with State or private counseling services, make recommendations, and the person is put in the appropriate course. Then we follow through to see that he or she gets a job when they complete training.

Mr. MILLER. Excuse me.

Mr. GAYDOS. Go ahead.

Mr. MILLER. You have nine rehabilitation specialists?

Mr. STOCKER. Yes, we do.

Mr. MILLER. Those specialists are supposed to be concerned with both the medical rehabilitation and occupational rehabilitation is that correct?

Mr. STOCKER. Yes, Mr. Congressman.

Mr. MILLER. Suppose that coincides with the number of regional offices.

Mr. STOCKER. Some of the vocational rehab specialists serve more than one district office. For example, we have one located in Norfolk servicing Philadelphia, Baltimore, and Norfolk. We have 16 district offices, but some, as I said, rehab people service more than one office.

Mr. MILLER. What is their caseload for a year?

Mr. STOCKER. I don't have an exact figure. We can supply that for you. Would you like that information?

Mr. MILLER. You said an injured worker is to be referred to a specialist within 60 days of becoming totally disabled?

Mr. STOCKER. If the employee is still off work after 60 days, the case is referred to the specialist for initial review. Of course, if he is about to return to work, there would be no action necessary. But if it appears at that time disability will be prolonged, the rehabilitation specialist makes the determination.

Mr. MILLER. That specialist has nothing to do - I don't understand their medical role. 60 days after a traumatic injury is a long period of time.

Mr. STOCKER. That review is to determine whether a rehabilitation medical program would be feasible. There is a branch of medicine, rehabilitation medicine, which is different from just treating a man.

Mr. MILLER. I understand that. We had testimony from rehabilitative medicine, and there in terms of traumatic injuries they were talking about immediate treatment in terms of occupational return, in terms of getting the treatment to accomplish something. It's my concern that doesn't preclude, if a person has a spinal or head injuries, from intensive immediate care, because 60 days according to those doctors is a long, long time.

Mr. STOCKER. An injured employee is permitted to choose his treating physician. This is an additional review for the purpose of determining whether we can provide a more positive treatment approach than he may be getting from the physician he selected.

Mr. ELISBURG. I think that is in addition to the employee's own physician in some cases, though perhaps not enough. But there are some cases where insurance carriers are involved. Many of them do have an active rehabilitation program where they, too, would involve themselves to the extent the employee is amenable in providing rehabilitation services.

Since we have gone to the free choice of doctors, of course, the control of that medical program is no longer in the hands of the employer. There were a number of reasons why that was put in the statute. I wouldn't want to

suggest from my testimony that we were overjoyed with the whole approach that we have been able to accomplish in rehabilitation. We were starting from a point where we didn't involve ourselves very much at all because we didn't have the resources.

I think as we see how this program develops it may likely become an area in which we would like to increase our services. I think in terms of rehabilitation needs it's important for someone to get in early in dealing with the employee's injury.

Mr. MILLER. I can understand an occupational assessment I made 60 days later, but I am not sure of the role of this specialist.

Mr. ELISBURG. It's really to be a monitoring role to review cases to make sure something is being done.

Mr. MILLER. He doesn't necessarily prescribe treatment.

Mr. ELISBURG. No.

Mr. MILLER. Does he disagree with the injured worker's doctor?

Mr. HARTMAN. He as an individual doesn't. There may be reference to a specialist in a particular field. Normally, in my own personal judgment it begins with the first visit to the doctor, whether it's a major injury or minor injury. Or whether it's in intensive care or not. The 1972 amendments placed greater emphasis on rehabilitation and the supervision of medical care. This is a beginning. In my judgment, it falls short of what is necessary. I think as time goes along we will see considerable improvement.

Normal motion, a fractured wrist, does it exist or doesn't it? It can be stiff. What can be done to relieve that? Is it merely exercise? Surgery? Excision of tendons? There has to be a judgment, and, if the physician's merely giving whirlpool baths and has a wheel on the wall and says, "Turn that for 15 minutes," and, sets the time clock, is that treatment effective?

To rehabilitate, is it possible some additional surgery would help the injured? I am not thinking necessarily of always reducing the impairment. If there is a 25-percent loss of use of the left hand there may continue to be 25-percent loss of use, and rehabilitation is not necessarily designed to reduce the amount of compensation benefits a person receives. In many instances, it has that effect. It gets a man back to work.

I think we can generally agree the best rehabilitation is to have the man or woman back on the job.

Mr. MUMFORD. Rehabilitation is not mandatory. It is an option. Our function is to serve as an intermediary.

Secondly, the statute doesn't require total disability compensation continue through the rehabilitation, but the statute does provide for a small allowance. So both these factors should be noted. And obviously the change in the makeup of the work force and those covered by the Longshore Act do have some effect on our ability to successfully complete rehabilitation as often as we would like to.

Mr. GAYDOS. Is it the feeling at this time that rehabilitation, as it existed in the Act throughout the years, is working or is not?

Mr. MUMFORD. We think, Mr. Chairman, that it's working much better than it had in the past. The Congress

expressed itself very clearly, and we have seen substantial change in the performance of our rehabilitation program since the '72 amendments.

Mr. ELISBURG. I must say, Mr. Chairman, we are just getting our feet wet in this issue. The matter of rehabilitation in all our programs is one which is going to be a growing program and of growing concern as to what efforts can be made to get injured workers back to work. I think in considering where we have come from, we have come a long way, but we have a long way to go.

Mr. GAYDOS. What seems incomprehensible is that we have had some sort of rehabilitation concept in the Act since its inception, and then in '72 we just touched it - we didn't touch it too much in '72.

For all these years, we have had this concept, and it appears we are missing the boat. I am wondering if the critics who are saying we are spending too much on rehabilitation are right or wrong. I don't know.

The simple question I am trying to find an answer for is: Does the rehabilitation concept have a future? Will we be getting more benefits as a result of the concept? Will it work?

Mr. ELISBURG. I think you have to look not only at this statute but at some of the other programs Congress has enacted which make clear the interest in rehabilitation programs. The Rehabilitation Act of '73 is quite extensive in providing the programs -

Mr. GAYDOS. Take a longshoreman who is called upon to do physical work, and unfortunately, he has not had much preparation or training in any other area. He gets injured and has muscle or tissue damage - a serious,

authentic injury. Is it your idea the concept of rehabilitation should be to train him for something else in the stevedoring industry or in another field? Or another industry, I mean.

Mr. STOCKER. Among the longshoremen, and particularly in the New York area, there is a certain reluctance to go into another field of endeavor. So most of our efforts there are, I would say, not as productive as they might be in some other area where you would have a more educated population and opportunities for preparing for other types of work.

But we do screen all the cases and make a determination.

Mr. GAYDOS. Are you reluctantly saying the stevedoring business, as we know it, has its limitations?

Mr. STOCKER. It may be. In that particular area, many of the longshoremen are foreign-born. They don't have English as a language which they can function in effectively. So we do have problems there.

In an area such as California, where the level of education is higher among longshoremen, I think we have a better chance of making progress. But since this is a national Act, we feel we should make the same effort in every part of the country, and that is the direction in which we are headed.

Mr. HARTMAN. One thing, Mr. Chairman, if I may, a case of any magnitude should be evaluated by a team of specialists, not by a rehabilitation counselor, not by an orthopedist, not by a neurologist, depending on the type injury, but by a team of four, five, or six who evaluate that individual, including a psychologist, as to background,

what his motivational needs might be, what his family relationship is, where can he be placed.

Then you come to the question of whether the employer will consider, what kind of job? This is where the rehabilitation specialist comes in. He gets the report of the evaluating team. He goes to the employer. Does that employer have a job which will permit the employee to work with the residual impairment the employee has?

If they find such a job for him, will they take him back? Will the insurance carrier agree they may take him back, or suggest not because he is a potentially greater risk? Failing with the employer, do you go out on the open market? That course is far from satisfactory.

Many years ago everyone was trained as a watchmaker. That seemed to be the basic approach to rehabilitation, particularly the paraplegic. Not everyone is competent to be trained to do the average bench job, particularly if it involves handling finite items. Even though our fingers have not been injured, we are not all dextrous with our fingers. Rehabilitation means different things to many people.

Mr. MILLER. When you get to the question you asked as to longshoremen, it's not getting the longshoreman interested in getting back to work. We will have to spend more time with employers as we do with other parts of the society. How do you get the employer to understand what a light-duty job is. If you have a totally disabled worker used to doing physical labor all the time, Mr. Chairman, you do have a problem in redirecting and recommending some new opportunity for that worker. It's a commitment we have made in our society, and we have to work on it.

Since we have another classification of cases in the small boatyards and marinas, what have you found there in terms of rehabilitation? You say in New York there has been a reluctance. Have you had the type injury that requires extensive rehabilitation?

Mr. ELISBURG. The question is what experience we have had in the small boatyards with totally disabled and retraining and rehabilitation in that area. I would have to sort through the cases to determine whether we have had any in that area. I don't know, and would have to furnish you the information.

Mr. MILLER. You don't know if you have had that kind of injury requiring sustained rehabilitation?

Mr. ELISBURG. That's right.

Mr. MILLER. Are you indicating there is a distinction in terms of the approach to rehabilitation throughout the country?

Mr. ELISBURG. No. The approach has to be the same -

Mr. MILLER. I am talking about in terms of the workers' interests. Is there a difference in stevedoring in the Northwest, as opposed to New York, as opposed to the Gulf Coast?

Mr. STOCKER. May I answer?

Mr. ELISBURG. Yes.

Mr. STOCKER. I would say there are differences in workers' attitudes in different parts of the country, and what their expectations are as to going into another type of work.

We have had a number -- in fact, the highest number for a district office rehabilitated during 1977 was the Dallas region, which includes New Orleans and Texas. We had 21 who completed rehabilitation, a training course. We had 21 also in the Seattle area. We had only three in New York, which doesn't speak too well by comparison, but this is those who completed training. It doesn't mean we don't provide the other services.

Mr. MILLER. When you say three in New York, you had three people who completed training?

Mr. ELISBURG. Yes.

Mr. MILLER. Out of how many were referred to a specialist.

Mr. STOCKER. Well, there were about 450 which were initially screened and went through some stage of consideration by the rehabilitation specialist.

Mr. MILLER. And three people completed training out of 450?

Mr. STOCKER. I should point out that a person who goes through a training course, that would involve perhaps 2 to 3 years. So there will be a time lag before the full effect of those specialists which we have on board now will be felt.

Part of that rehabilitation was handled in the past, as Mr. Elisburg indicated, on a part-time basis by the Federal Employees' Compensation staff.

Mr. MILLER. These other 400 -- were they in various stages of compensation, or did they say they didn't want any, or where are they in the system?

Mr. STOCKER. We can provide that information for you.

Mr. ELISBURG. Some of each of the conditions you mentioned. [The information referred to follows:]

LHWCA Rehabilitation Program
Employees in Small Boat Industry
FY 1977 and 1978

There are no injured workers from the small boat industry in LHWCA rehabilitation programs.

Injured Workers in LHWCA Rehabilitation Programs
in New York Compensation District During FY 1978

- I. Injured workers currently in training programs in the New York Compensation district:
1. A 48 year old shipyard electrician, with aggravated cervical arthritis in a 21 month course to become an architectural technician.
 2. A 24 year old shipyard welder, with a herniated lumbar sacral disc in a 10 month course to become a commercial artist.
 3. A 27 year old shipyard welder, with a loss of one eye and hand limitations in a 48 month course in business administration for management.
 4. A 47 year old shipyard rigger, with shoulder, thigh and knee limitations in a 7 month course in jewelry making.
 5. A 22 year old laborer, with knee limitations in a 7 month course in major appliance repair.

II. Injured workers in New York district office who left training programs before completion during FY 1978:

1. A 49 year old ship lasher, having a loss of one eye, interrupted a 10 month accounting clerk program because of further medical problems.
2. A 23 year old shipfitter, with neck, shoulder and knee limitations interrupted an 8 month photographer program because of further medical problems.
3. A 41 year old ship structural fabricator, with hip limitations interrupted a 24 month engineering aid program because of further medical problems.
4. A 36 year old longshoremen, with back, neck and shoulder limitations interrupted a 9 month jewelry making program because of personal problems.
5. A 33 year old shipfitter, with back and knee limitations interrupted a 10 month typewriter repair program because of personal problems.

III. Injured workers in New York Compensation district rehabilitated by placement through the LHWCA rehabilitation program during FY 1978:

1. A 36 year old ship painter, with back and hip limitations, was selectively placed in light duty painting position.
2. A 51 year old ship rigger, with back and hand limitations, was selectively placed as a crane signal person.

3. A 36 year old ship carpenter, with knee limitations, was selectively placed in a light duty carpentry shop position.
4. A 52 year old shipfitter, with back limitations, was selectively placed in a light duty pipe ship position.
5. A 43 year old ship welder, with back and knee limitations, was selectively placed as a stock clerk.
6. A 44 year old yard man, with foot limitations, was selectively placed as a Hi-Lo driver.
7. A 27 year old ship pipe fitter, with back and knee limitations, was selectively placed in a light duty pipefitter position.

The LHWCA Rehabilitation Process

- I. Purpose: To provide all eligible injured workers early referral to and delivery of needed medical or vocational rehabilitation programs.
- II. Screening: Many injured workers enter the process who subsequently are found not eligible or not in need of programs. The nationwide statistics for screening in FY 1978 indicate the following:
 1. 40 of every 100 injured workers being compensated are referred to a Longshore Rehabilitation Specialist for the determination of eligibility and need. 33 of the 40 are eliminated for one of the following reasons:
 - a. No permanent disability.
 - b. Return to work without the need for a LHWCA rehabilitation program.

- c. Refuses LHWCA rehabilitation services.
 - d. The rehabilitation specialist determines that a rehabilitation program will not help the injured worker return to work.
2. 7 of every 40 injured workers referred to the Longshore Rehabilitation Specialist are referred by the specialist for testing and evaluation to develop a rehabilitation program. 4 of the 7 are eliminated for one of the following reasons:
- a. Lack of improvement (pain) or exacerbation of medical condition
 - b. Was able to return to work without DOL help
 - c. Case settled
 - d. Refuse to change unrealistic vocational goal
 - e. Drops out and refuses further contact
 - f. Decides to seek employment without DOL help
 - g. Does not keep appointments
 - h. Death
3. 3 of every 7 injured workers tested and evaluated enter medical, training or placement rehabilitation programs. 1 and a fraction of the 3 are not rehabilitated for one of the following reasons:
- a. Exacerbation of medical condition
 - b. Absenteeism

App. 44

- c. Drops out and refuses further contact
 - d. Will not change unrealistic expectations about new job
 - e. Loses interest
 - f. Develops family problems and refuses help
 - g. Develops educational problems and refuses help
 - h. Returns to a job that will cause further medical problems
 - i. Death
4. 1 and a fraction of every 3 injured workers who enter medical, training or placement rehabilitation programs are rehabilitated. An analysis of those rehabilitated in FY 1978 indicates the following:
- A. 56% were in training programs
 - (1) 59% completed training
 - (2) The average time of a completed training program was 11 months
 - (3) 60% were placed in the occupation trained. The occupations were the following: blue print reader; clerk-general, typist, payroll and pricing; draftperson; electronics assembling; heavy equipment maintenance foreman; instrument repair-person; landscaper; mechanic - automobile, generator and starter, motorcycle, outboard/inboard, and small engine; police officer; salesperson - general,

and real estate; tailor; technician - electronics, orthodontic, and television; warehouse supervisor; and welder.

- (4) 37% were placed in other than the occupational trained. The occupations were the following: administrative assistant, carpenter, change collector, cook, counterperson, crane operator, draftsperson, furniture serviceperson, manager - fast food, painter, salesperson, small boat builder and truck driver.

B. 44% were in placement only programs

- (1) 75% were placed with new employers
- (2) 83% were placed in a new occupation
- (3) Injured workers in placement only programs were rehabilitated in the following occupations: body and fender repair person; caretaker; clerk - administrative, stock, store, and tool room; custodian; dispatcher; driver - chauffeur, bus, hilly, and truck; electrician; mold loft helper; painter; pipe fitter; salesperson - insurance, and store; seamstress; security guard; and steam-cleaner.

III. Summary: For every 40 injured workers referred to the Longshore Rehabilitation Specialist, 3 enter rehabilitation programs and 1 and a fraction are rehabilitated.

See Exhibits 3 and 4 for FY 1976 and 1977 statistics on injured workers who start and finish LHWCA rehabilitation programs.

Mr. GAYDOS. Mr. Erlenborn.

Mr. ERLNBORN. Mr. Secretary, during the hearings and today as well, there has been reference to the 1972 amendments. From your position as a member of the Senate committee staff when those amendments were considered, I believe you are able to give us a unique insight which other Secretaries may not be able to do.

During the consideration of the '72 amendments, there never was any discussion in the hearings, nor, as I understand it, were there any provisions in the House and Senate bills as introduced, of unrelated death benefits.

Have you any knowledge as to how that provision got into the final legislation?

Mr. ELISBURG. I would want to review the legislative history. I don't have any specific recollection, other than it obviously was one of the proposals being discussed by the members of the committee.

Mr. ERLNBORN. I was not active in that legislation, but I understand there was a House bill and a Senate bill, but there was no conference. Is that correct?

Mr. ELISBURG. I believe that's correct.

Mr. ERLNBORN. There was agreement between the managers, House and Senate, but no actual conference?

Mr. ELISBURG. I believe that's correct.

Mr. ERLNBORN. The bill that finally passed was substantially the Senate version of the legislation, was it not?

Mr. ELISBURG. If I won't get in trouble, I guess the answer is yes.

Mr. ERLNBORN. Some witnesses have claimed that employers are unable to obtain an independent physical examination of claimants. Is that true? What is the Department of Labor's position on that?

Mr. ELISBURG. We have a process for an independent medical examination.

Mr. Stocker will you explain how it works?

Mr. STOCKER. Yes. Mr. Congressman, the Act requires each employee to submit to an examination by a physician of the employer's choice, if requested. Should he refuse, he may not be entitled to compensation for any period he declines to undergo such examination.

Mr. ERLNBORN. If any witness makes that claim again, we can tell them under the Act the employer has that right and that will be enforced by the Department of Labor?

Mr. STOCKER. Yes. If we are advised in any instance that an employer wishes to have a claimant examined and the claimant refuses, we would like for them to advise our office.

As a matter of fact, they should advise our district office they are going to have such examination.

Mr. ERLNBORN. Talking about the physicians' examinations, can you tell me why the panel of physicians was abandoned in 1972? Had there been troubles with the system?

Mr. ELISBURG. Yes. I think there was testimony and concern that the physicians were largely selected -- they were a panel selected by the employers -- and there was either a real or perceived feeling on the part of the injured workers that they were not receiving fair medical examination. So the Congressional judgment was to authorize the employee's choice of physician. I might say that is within some limits.

For example, taking an extreme case, perhaps, an injured worker goes to an orthopedist for a dermatitis condition. If you get to medical specialties, the Department has the responsibility to supervise the medical care. There would be that kind of limitation.

Our basic view has been, however, within that kind of function, to the extent the physician is licensed within the State, that the employee has the right to use that physician.

There may be some other extreme cases.

Mr. ERLNBORN. That's the only basic limitation?

Mr. ELISBURG. Yes, sir, the licensing, the specialty, and conceivably the location. I don't know whether that ever comes up.

Mr. ERLNBORN. Witnesses have also stated in some cases there is no incentive to return to work or to be rehabilitated, since in many cases the claimant's after-tax income is higher with compensation than when he was working.

Have you any facts or figures as to whether this is true and, if so, to what extent?

Mr. ELISBURG. The law provides for two-thirds of your wage, and no matter how highly paid you are, you never get more than two-thirds of your wage.

I suppose it's conceivable there would be certain situations where they would have more money coming in than they would if they paid taxes on it. I don't think that it too likely for most workers, and it certainly is not a novel approach to the workers' compensation problems. The Longshore Act doesn't do anything more than provide the basic benefit percentage that 50 other statutes in the United States provide. Two-thirds is the accepted level.

Mr. ERLNBORN. Is that generally the level in all States?

Mr. ELISBURG. Virtually all, I think, are two-thirds. The difference is what you get as a maximum benefit. But for the typical industrial worker - well, for everyone - it would be two-thirds. The maximums don't come into play until you come to the higher paid workers.

Mr. ERLNBORN. Witnesses have also claimed employers are required to pay all lost income arising from an injury. For instance, an employee works not only in covered work as a longshoreman, but part time as a house painter, and his injury prohibits employment in the noncovered part-time work as well. The employer is required to compensate the employee for the outside work as well as the covered work. Is that correct?

Mr. ELISBURG. The question is, when you pay benefits - you are paying the average weekly wages - do you go back to the average weekly earnings of the employee? To the extent they were doing something else, that would be

included in the mix. But in no event would they get more than two-thirds of the actual wage.

Mr. ERLNBORN. Let us say he is a very successful house painter, makes a lot of money at it. Suppose his income from that might exceed what he was earning in covered income.

Mr. ELISBURG. I suppose anything is possible.

Mr. ERLNBORN. But generally the concept is the employer is insuring the income, not just the covered wages, but the income of the employee from whatever source?

Mr. ELISBURG. I believe, Congressman, that is true in most other jurisdictions.

Mr. ERLNBORN. Is that true in State workers' compensation?

Mr. LILLY. Section 10(c) of the Act includes the phrase "in which he was working or other employment of such employee."

So actually, if you go to section 10(c) of the Act in order to determine the wage rate at which he may be compensated, yes, you may include other employment to fairly arrive at his average weekly rate.

Mr. ELISBURG. I believe it is correct; many other State compensation laws provide the same basis. I would be glad to provide that information.

Mr. ERLNBORN. Yes; I think that would be helpful for the record.

Mr. GAYDOS. Submit that along with other documentation. [The information referred to follows:]

* * *

U.S. Department of Labor
Employment Standards Administration
Division of State Workers' Compensation Standards
July 1978

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S.

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Alabama.....	66 ⅔	\$48 – 25 percent of State's average weekly wage, or average wage if less.	\$128 – 66 ⅔ percent of State's average weekly wage.....	300 weeks.....	
Alaska.....	66 ⅔	\$65 or average wage if less.	\$607.85 – 133.3 percent of the State's average weekly wage ¹	Duration of disability.....	
Arizona.....	66 ⅔	\$30 if worker is 21 years of age or over, plus \$2.30 for total dependents.	\$153.85, plus \$2.30 for total dependants.	Duration of disability....	
Arkansas.....	66 ⅔	\$15.....	\$87.50.....	450 weeks.....	\$39,375
California.....	66 ⅔	\$49.....	\$154.....	240 weeks.....	
Colorado.....	66 ⅔	No statutory minimum.	\$175.60 – 80 percent of State's average weekly wage ²	Duration of disability.....	(²)
Connecticut.....	66 ⅔	\$20 ³	\$147 – 66 ⅔ percent of State's average weekly wage. ³	Duration of disability.....	
Delaware.....	66 ⅔	\$51.49 – 22 ⅔ percent of the State's average weekly wage, or actual wage if less.	\$154.50 – 66 ⅔ percent of State's average weekly wage.	Duration of disability.....	
District of Columbia...	66 ⅔	\$91.81 – 50 percent of national average weekly wage, ⁴ or worker's actual wage if less.	\$367.22 – 200 percent of national average weekly wage. ⁴	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Florida.....	60	\$20, or actual wage if less.	\$126 - 66 ⅔ percent of State's average weekly wage ⁵	350 weeks.....	
Georgia.....	66 ⅔	\$25 or actual wage if less.	\$110.....	Duration of disability.....	
Hawaii.....	66 ⅔	\$47 - 25 percent of applicable maximum, or average wage if less. ⁶	\$189 - 100 percent of State's average weekly wage.	Duration of disability	
Idaho	'60	\$82.35 - 45 percent of the State's average weekly wage. ³	\$109.80 to \$164.70 - 60 to 90 percent of the State's average weekly wage ³	52 weeks; thereafter 60 percent of the state's average weekly wage, for duration of disability.....	(⁴)
Illinois	66 ⅔	\$100.90 to \$124.30 ³ , or average wage if less.	\$321.30 - 133 ⅓ percent of State's average weekly wage.	Duration of disability	
Indiana.....	66 ⅔	\$50, or average wage if less.	\$120	500 weeks.....	\$60,000
Iowa.....	'80	\$48.01, or actual wage if less	\$265 - 133 ⅓ percent of State's average weekly wage. ⁷	Duration of disability.....	
Kansas	⁸ 66 ⅔	\$7	\$129.06 - 66 ⅔ percent of State's average weekly wage. ⁸	Duration of disability.....	\$50,000
Kentucky.....	66 ⅔	\$37 - 20 percent of the State's average weekly wage.	\$112 - 60 percent of the State's average weekly wage.	Duration of disability.....	
Louisiana.....	66 ⅔	\$39 - 20 percent of State's average Weekly wage, or actual wage if less.	\$130 - 66 ⅔ percent of State's average weekly wage.	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Maine	⁹ 66 %	\$25.....	\$231.72 – 133 ⅓ percent of State's average weekly wage ⁹	Duration of disability	
Maryland.....	66 %	\$25, or actual wage if less.	\$202 – 100 percent of State's average weekly wage.	Duration of disability.....	
Massachusetts	66 %	\$30, or average wage if less, but not less than \$15 if normal working hours are 15 or more. ¹⁰	\$150 ¹⁰	Duration of disability	¹⁰ \$37,500
Michigan	66 %	\$105 to \$120 ⁷	\$142 to \$171 ¹¹ ..	Duration of disability.....	
Minnesota.....	66 %	\$98.50 – 50 percent of State's average weekly wage, or employee's actual wage if less, but not less than 20 percent of State's average weekly wage.	\$197 – 100 percent of State's average weekly wage.	Duration of disability	
Mississippi	66 %	\$25	\$91	450 weeks.....	\$40,950
Missouri	66 %	\$16, or actual wage if less.	\$155.....	400 weeks.....	
Montana.....	66 %	No statutory minimum.	\$188 – 100 percent of State's average weekly wage. ¹²	Duration of disability.....	
Nebraska.....	66 %	\$49, or actual wage if less.	\$155.....	Duration of disability.....	
Nevada	66 %	No statutory minimum.	\$212.02 weekly – 100 percent of State's average monthly wage.	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
New Hampshire.....	(¹³)	\$30, or average wage if less.	\$180 – 100 percent of State's average weekly wage. ¹³	Duration of disability	
New Jersey	66 %	\$15.....	\$146 – 66 ⅔ percent of State's average weekly wage.	300 weeks.....	
New Mexico.....	66 %	\$36, or actual wage if less.	\$172.46 – 100 percent of State's average weekly wage.....	600 weeks	(¹⁴)
New York	66 %	\$30, or actual wage if less.	\$180 ¹⁵	Duration of disability.....	
North Carolina	66 %	\$20.....	\$168 – 100 percent of State's average weekly wage.	Duration of disability	
North Dakota.....	66 %	\$108 – 60 percent of State's average weekly wage, or employee's actual wage if less.	\$1.00 – 100 percent of State's average weekly wage, plus \$5 for each dependent child, but not to extend workers' net wage after taxes and Social Security.	Duration of disability.....	
Ohio.....	66 %	\$72 – 33 ⅓ percent of State's average weekly wage, or actual wage if less.	\$216 – 100 percent of State's average weekly wage.	Duration of disability.....	
Oklahoma.....	66 %	\$30, or actual wage if less.	\$121 – 66 ⅔ percent of State's average weekly wage.	300 weeks, may be extended to 500 weeks.	
Oregon.....	66 %	\$50, or 90 percent of actual wage if less.	\$226.26 – 100 percent of State's average weekly wage.	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Pennsylvania	66 %	\$106.50 – 50 percent of State's average weekly wage, with absolute minimum of \$71 – one-third maximum weekly rate.	\$213 – 100 percent of State's average weekly wage.	Duration of disability	
Puerto Rico	66 %	\$10.....	\$45	312 weeks.....	
Rhode Island.....	66 %	\$30	\$176 – 100 percent of State's average weekly wage, plus \$6 for each dependent; aggregate not to exceed 80 percent of workers' average weekly wage. ¹⁶	Duration of disability. ¹⁶	(¹⁶)
South Carolina.....	66 %	\$25.....	\$178 – 100 percent of State's average weekly wage.	500 weeks.....	
South Dakota.....	66 %	\$78 – one-half of maximum weekly benefits, or average weekly wage less.	\$155 – 94 percent of State's average weekly wage. ¹⁷	Duration of disability	
Tennessee.....	66 %	\$15	\$100	Duration of disability.....	\$40,000
Texas	66 %	\$19 ¹⁸	\$91 ¹⁸	401 weeks.....	
Utah.....	66 %	\$45 to \$70 ³	\$197 – 100 percent of State's average weekly wage.	312 weeks.....	
Vermont	66 %	\$91 – 50 percent of State's average weekly wage, plus \$5 for each dependent under 21, or average wage if less.	\$181 – 100 percent of State's average weekly wage, plus \$5 for each dependent under 21.	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Virginia	66 %	\$44.75 – 25 percent of State's average weekly wage, or employee's actual wage if less.	\$187 – 100 percent of State's average weekly wage.	500 weeks	(¹⁹)
Washington	²⁰ 60-75	\$42.69 to \$81.23 ⁷	\$175.30 – 75 percent of state's average wage, adjusted annually. ³⁰	Duration of disability.....	
West Virginia.....	70	\$76.67 – 33 1/3 percent of States average weekly wage.	\$224 – 100 percent of State's average weekly wage.	200 weeks	
Wisconsin.....	66 %	\$30.....	\$202 – 100 percent of the State's average weekly wage.	Duration of disability.....	
Wyoming.....	66 %	\$43.....	\$211.15 weekly – 100 percent of State's average monthly wage.	Duration of disability	
*United States FECA	²² 66 %-75	\$101.47, ²¹ or actual wage if less.	\$678.25 ²¹	Duration of disability.....	
LS/HWCA	66 %	\$91.81 – 50 percent of national average weekly wage, or worker's actual wage if less. ⁴	\$367.22 – 200 percent of national average weekly wage. ⁴	Duration of disability.....	

See footnotes at end of table.

* FECA means Federal Employee' Compensation Act (5 U.S.C. 8101-8150), LS/HWCA means Longshoreman's and Harbor Workers' Compensation Act (33 U.S.C. 901-950).

¹ *Alaska*: Effective January 1, 1978, maximum weekly benefits will be 166.6 percent of the State's average weekly wage; and January 1, 1981, 200 percent. If periodic retirement of survivors' benefits are payable under the Federal OASDI, the workers' compensation weekly benefits shall be reduced by one-half the amount of such Federal benefit for each week. If Federal OASDI benefits are payable for a work-related injury for which a workers' compensation claim has been filed, the workers' compensation benefits shall be offset by an amount by which the sum of the weekly Federal and State workers' compensation benefits exceed 80 percent of the employees' average weekly wages at time of the injury.

² *Colorado*: Workers' compensation weekly benefits shall be reduced (but not below 0) by an amount equal to any periodic disability benefits granted pursuant to either a Federal or other State's workers' compensation law or an employer pension plan.

³ According to number of dependents. In Washington, according to marital status and number of dependents. In Connecticut, \$10 for each dependent child under 18, up to 50 percent of the basic weekly benefit, total benefits not to exceed 75 percent of the employee's average weekly wage. In Idaho, increased by 7 percent of currently applicable average weekly State wage for each child up to 5 children. In Utah, \$5 for dependent spouse and each dependent child up to 4, but not to exceed 100 percent of State's average weekly wage.

⁴ *D.C. and LS/HWCA*: "National average weekly wage," as determined by the Secretary of Labor, shall be based on the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

⁵ *Florida*: If periodic disability benefits are payable to the worker under the Federal OASDI, the worker's compensation benefits and the Federal payment shall not exceed 80 percent of the employee's average weekly wage. Said offset shall not be applicable when worker reaches age of 62. In addition, weekly benefits payable under the unemployment compensation law of any State are offset against workers' compensation benefits.

⁶ *Hawaii*: Law states the minimum weekly benefit shall be \$38, or 25 percent of the applicable maximum weekly benefit, rounded to the percent dollar, whichever is higher.

⁷ *Iowa*: Maximum percentage of wages based on employee's average weekly spendable earnings. Effective July 1, 1979, maximum weekly benefits will be 166 2/3 percent of the State's average weekly wages and beginning July 1, 1981, 200 percent.

⁸ *Kansas*: Maximum percentage of wages based on employee's average gross weekly wage.

⁹ *Maine*: maximum percentage of wages based on employee's average gross weekly wage. Effective July 1, 1979, maximum weekly benefits will be 166 2/3 percent of the State's average weekly wages and July 1, 1981, 200 percent.

¹⁰ *Massachusetts*: Plus a weekly allowance of \$6 for each total dependent, but the aggregate shall not exceed the worker's average weekly wage. The total maximum for temporary total and permanent partial disability is \$37,500. Effective October 1, 1978, the maximum weekly benefit will change to the State's average weekly wage; the minimum weekly increase to \$40 and the absolute minimum to \$20; the total maximum will increase to \$45,000.

¹¹ *Michigan*: The maximum benefit rate is adjusted annually on the basis of a \$1 increase or decrease for each \$1.50 increase or decrease in the State's average weekly wage.

¹² *Montana*: If periodic disability benefits are payable to the worker under the Federal OASDI, the worker's compensation weekly benefits shall be reduced (but not below 0) by an amount approximating one-half such Federal benefits for such week.

¹³ *New Hampshire*: Benefits set in accordance with a "wage and compensation schedule" up to average weekly wage of \$138 (maximum benefit \$92). If the employee's average weekly wage is over \$138, compensation shall be 66 2/3 percent of such wage, not to exceed 100 percent of State's average weekly wage rounded to the nearest dollar.

¹⁴ *New Mexico*: The total maximum is an amount equal to 600 multiplied by the maximum weekly compensation payable at the time of injury.

¹⁵ *New York*: Effective January 1, 1979, maximum weekly compensation will be \$215.

¹⁶ *Rhode Island*: After 500 weeks, or after \$32,500 has been paid, payments to be made from second injury fund for period of disability.

¹⁷ *South Dakota*: Effective July 1, 1979, maximum weekly benefits will be 100 percent of State's average weekly wage, computed to the next higher multiple of \$1.

¹⁸ *Texas*: Each cumulative \$10 increase in the average weekly wage for manufacturing production workers will increase the maximum weekly benefit by \$7 per week, and the minimum by \$1 per week.

¹⁹ *Virginia*: Total maximum amount payable shall be the result obtained by multiplying the State's average weekly wage for the applicable year by 500.

²⁰ *Washington*: For injuries occurring prior to July 1, 1971, a specified formula provides for an annual adjustment of benefits.

²¹ *Federal employees*: Based on 75 percent of the pay of specified grade levels in the Federal civil result.

**OVERSIGHT HEARINGS ON THE LONGSHORE-
MEN'S AND HARBOR WORKERS' COMPENSA-
TION ACT**

Part 2

WEDNESDAY, JULY 12, 1978

**House of Representatives,
Subcommittee on Compensation, Health and Safety,
Committee on Education and Labor,
Washington, D.C.**

The committee met, pursuant to recess, at 10:30 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Murphy, Cornell, Zeferetti, Myers, Miller, and Buchanan.

Staff present: Paul F. Dwyer, subcommittee counsel, and Edith C. Baum, minority counsel for labor.

Mr. Gaydos. The Subcommittee on Compensation, Health and Safety of the Education and Labor Committee will come to order.

We have visiting us this morning some of our colleagues who are not on the committee but who have a very sincere interest in the subject matter we are about to continue hearings on — Mrs. Boggs from Louisiana, who has been very active since the hearings we had in her district in the State of Louisiana. I believe she has some of her people here who are interested in this matter. It would be my pleasure on behalf of the committee to recognize our colleague, Mrs. Boggs.

**STATEMENT OF HON. LINLEY (MRS. HALE)
BOGGS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF LOUISIANA**

Mrs. Boggs. Thank you, Mr. Chairman. Thank you very much for holding these hearings and for your continued interest in a matter of great concern to not only our area of the state but to the entire state of Louisiana and to the nation.

I am very hopefully that the testimony that will be given here today will fall on receptive ears and that we will be able, working together, to do something about the situation, particularly in regard to the high insurance rates and the difficulty in obtaining insurance

* * *

Mr. MCKAY, Mr. Niles.

[The prepared statement of Stewart Niles, Jr., follows:]

**STATEMENT OF STEWART E. NILES, JR.
SPECIAL COUNSEL FOR AMERICAN
WATERWAYS SHIPYARD COMMITTEE
OF THE AMERICAN WATERWAYS OPERATORS**

Mr. Chairman, Members of the Committee:

I.

Introduction

My name is Stewart E. Niles, Jr. I am a partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, of New Orleans, Louisiana. It has been my honor to have previously testified before this Subcommittee in Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act. I appear before you today as

special counsel for the American Waterways Shipyard Committee.

The American Waterways Operators (AWO) is a national trade association of domestic marine transportation founded in 1944. The AWO is comprised predominantly of tugboat and barge operators who service this country nationwide. The American Waterways Shipyard Committee (AWSC) is, as its name suggests, a committee of 51 shipyards varying from small to intermediate in size. The AWSC was founded in 1976, primarily in response to the disastrous effects of the 1972 amendments of the LHWCA on its members.

II.

Economic Impact of 1972 Amendments

The 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act has had particularly adverse impact upon small to intermediate shipyards. This continuing impact has had far-reaching effects, including loss of jobs and loss of contracts.

Small to intermediate shipyards have insufficient resources to risk a program of self insurance. Hence, virtually all such shipyards are forced to obtain insurance coverage. Review of the insurance premiums charged to such shipyards over an eight-year period is revealing.

A. Increase In Wages Compared To Increase In LHWCA Rates.

Increase in LHWCA insurance rates has far outdistanced the increase in wages for the comparable period of

time. In 1976, the American Waterways Shipyard Committee conducted a survey making such comparison. Table I reflects the results of some of the shipyard responses. In 1976, shipyard wages had increased from approximately 150-190 percent over the year 1968. Meanwhile, by 1976, LHWCA compensation rates had generally risen from 250-500 percent, with many shipyards reporting increases substantially in excess thereof. Moreover, further review of Table I reveals that LHWCA compensation rates remained generally static between 1968 and 1971.

* * *

Benefits are not awarded as a wage replacement system. Award or compensation for most injuries comes under the provisions of §8(c)(1-20), commonly referred to as "scheduled benefits". However, where an employee has an actual loss of earnings which is below his average weekly wage at the time of his accident, §8(c)(21) provides that the employer shall pay two-thirds of such actual loss. However, this provision has been liberally interpreted by the Benefits Review Board, and claimants are receiving awards under §8(c)(21) when the employee has not sustained actual loss of earnings. This Committee should consider an amendment which would provide that an employee could receive an award under §8(c)(21) if he sustains an actual loss of wages; thus, an employee's earning capacity would not be less than his actual earned wages.

The LHWCA does not contain incentives for an employee to return to work. This Committee should undertake revision to provide for the coordination of benefits from all sources. An injured employee should be provided an adequate remedy; however, the LHWCA

should not be a retirement system. Positive incentives for a recipient to return to work must be established.

The LHWCA must be amended to promote an employee's participation in rehabilitation.

Death benefits for death unrelated to employment should be removed from the Act. An employer should not be compelled to pay a death benefit unless an employee dies from causes related to the employment. If this Committee believes all workmen who die from causes unrelated to employment should receive compensation under the LHWCA, these costs should be borne by the populace as a whole.

The annual escalation clause should be fixed. It is impossible for employers, self-insurers and insurance companies to predict the ultimate cost impact of compensation for recipients entitled to receive an annual adjustment under the escalation clause.

The Act should be amended to confirm that death benefits are subject to the maximum and minimum limitations of the Act. Through an apparent oversight, the 1972 Amendments failed to include death benefits in the maximum limitation provisions.

The test for permanent total disability should be clarified. The Benefits Review Board has allowed employees to receive benefits for permanent total disability although the employee may be actually employed. An employee who is capable of gainful employment or who is actually engaged in gainful employment should not fall within this classification.

This Committee should Assure that the Department of Labor follows clear Congressional mandate in the

App. 63

application of §8(f), Injury Increasing Disability. If an employee has a pre-existing disability and the disability is worsened, the employer pays compensation pursuant to §8(f). Although

* * *

BULLETIN

California Workers' Compensation Institute

1111 Broadway #2350, Oakland, CA 94607
(510) 663-1063 www.cwci.org

* * *

Copyright 2003, California Workers' Compensation Institute

Institute Bulletins are available on the Member/Subscriber page of the CWCI website (<http://www.cwci.org>). The public also may visit the website to access additional information.

Vocational Rehabilitation

- Statutory authorization and structure repealed for dates of injury o/a 1/1/ 2004 [Labor Code § 139.5 & §§ 4635-4647]
- New Labor Code § 139.5 for dates of injury o/a 2004 provides for a Supplemental Job Displacement Benefit to Injured Workers who:
 - Sustain permanent partial disability
 - Do not return to work for the at-injury employer within 60 days
- The benefit will be a nontransferable voucher for education-related costs at state approved and accredited schools
- The amount of the benefit will be up to:

App. 65

Voucher Amount	Permanent Partial Disability
\$4,000.00	Less than 15%
\$6,000.00	15%-25%
\$8,000.00	26%-49%
\$10,000.00	50%-99%

- Up to 10% of the voucher may be used for vocational or return to work counseling
- Within 10 days of the last TD payment, the employer is to send a notice of rights re: Supplemental Job Displacement Benefit to the injured worker via certified mail
- The new Labor Code § 139.5 language is restated in Labor Code § 4658.5, plus the Administrative Directory is to devise a notice and adopt regulations regarding payment
- The employer shall not be liable for the Supplemental Job Displacement Benefit if either of the following occur within 30 days from termination of TD
 - The employer offers and the employee rejects or fails to accept modified work lasting at least 12 months
 - The employer offers and the employee rejects or fails to accept alternative work meeting the following criteria
 - The employee has the ability to perform the essential functions
 - It is a regular position lasting at least 12 months
 - It offers wages/compensation within 15% of pre-injury earnings

App. 66

- The location is within a reasonable distance from the employee's home at time of injury [Labor Code §4658.6]

* * *

**SENATE REPORT ON CONFERENCE REPORT
ON S. 38, LONGSHOREMEN AND
HARBOR WORKER'S COMPENSATION ACT
AMENDMENTS OF 1984 (SEPTEMBER 20, 1984)**

**LONGSHOREMEN AND LONGSHORE AND HARBOR
WORKERS COMPENSATION ACT AMENDMENT -
CONFERENCE REPORT**

Mr. NICKLES, Mr. President, on May 14, 1981. S. 1182, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act was first introduced by myself with Senator Nunn cosponsoring. Since that time, the Senate Labor Subcommittee, which I chair, has held 4 days of hearings and the bill has undergone any number of rewritings. We thought that one compromise would, become public law at the end of the 97th Congress. That did not happen.

At the beginning of the 98th Congress. I reintroduced amendments to the Longshore Act as S. 38, I am pleased that a compromise version is finally out of conference, has passed the House, and is before the Senate for a vote today. In my opinion, this compromise, taken as a whole, is worthy of final passage and provides many needed reforms to the Longshore Act. There are some provisions which, taken alone, cause me some philosophical problems. These concerns, however, are greatly outweighed by the benefits in the entire package.

* * *

Mr. HATCH. Mr. President, it is with a great sense of accomplishment and satisfaction that I join Senator NICKLES in urging the adopting of this conference report to S. 38 - a bill which I had the privilege of cosponsoring.

This measure is the product of literally a decade of intense debate, close scrutiny, and hard negotiation.

It is not the handiwork of a select few, fashioned during some midnight hour. Many people contributed to the development of this bill, some of whom deserve special recognition. Senator NICKLES is to be commended for his diligent pursuit of these amendments. As a freshman Senator 3½ years ago, he tackled the Longshore Act as one of his first issues. And despite the disappointment of the 97th Congress, he pressed ahead in the 98th Congress for reform. As students of geography will attest, Senator Nickles' home State of Oklahoma does not have many deep water ports and thus his State was more of an indirect, rather than direct, concern over the Longshore Act. Some might therefore have wondered whether after the discouragements of the 97th Congress, he should have turned his attention to interests closer to home. Yet, in mark of true leadership, as chairman of the Labor Subcommittee, he pressed ahead in this Congress.

I would also like to commend Senator KENNEDY, whose support of a consensus bill in the Senate provided a great boost to the legislation. Senator NUNN and Senator ROTH are deserving of recognition for their early work on the Permanent Subcommittee on Investigations. Their aggressive and thorough investigation of waterfront corruption brought to light the manner in which the current law was being abused by corrupt individuals. Their recommendations for enacting more stringent sanctions were invaluable contributions, and the conference report contains many of their recommendations.

I acknowledge also the tremendous contributions of Representative MILLER and Representative ERLNBORN

who led the House conferees. It is undisputed that without their dedication, and the tireless and highly professional work of their staffs, there would be no Longshore Amendments of 1934.

Because the legislation was so technical and complicated, the conferees had to rely heavily upon the assistance of the Department of Labor as well as the Office of Legislative Counsel. Among those who deserve commendation are Ms. Susan Meisinger, Mr. Cornelius Donoghue, Mr. Peter D. Galvin, Mr. Larry Rogers, Mr. Neil Monotone, Mr. Irwin M. Wolkow, Mr. James Demarce, Ms. June Robinson, Mr. Carvin Cook, Judge Robert L. Ramsey, and Ms. Sydnee Schwartz. Also I express my thanks to Mr. Steven Cope in the Office of Legislative Counsel, who oversaw the final crafting of the statutory language. Finally, I would like to pay tribute to Mr. Robert Collyer, former Deputy Under Secretary of Labor for Employment Standards Administration, whose early leadership and contribution were instrumental in developing this measure.

The Longshore Act is like other workers' compensation laws in that it is not static. It is a dynamic one, continually evolving. The Congress, of course, has established the statutory framework, enunciating the major policy objectives toward compensating work-related injuries and deaths. However, the courts and the Department of Labor interpret and administer this law, and they must continually apply this law to unique situations which Congress did not envision. In many instances, the results are in keeping with congressional intent and purpose. But in other instances this interstitial lawmaking is clearly out of bounds and is disruptive of the consensus reached by employer and employee interest groups. In addition, it

must be candidly acknowledged that Congress itself often sows the seeds for future legislative reform. The 1972 amendments are a case in point. Although to its credit it solved many problems, its craftsmanship has prompted Chief Justice Burger to observe that the act was "about as unclear as any statute could conceivable be * * * ". The stage is thus set for congressional action when the collective product of judicial and administrative action finally activates a broad spectrum of interest groups to seek legislative change.

The Longshore Act does not lend itself to amendment easily or often. Like other labor laws, the act has been forged in the heat of political controversy, between the inherently adversarial forces of business and labor. It embodies compromises not easily reached, which are often then euphemistically described as "delicate balances." That internal balance could be easily destroyed if the act were subject to continual amendment.

S. 38 reflects a fragile consensus, carefully crafted over the last several years. It is a bill which provides benefits for all the affected interest groups. It benefits workers by facilitating the processing of occupational disease claims. It also benefits retired workers who become impaired as a result of a late manifesting occupational disease by affording an opportunity to obtain compensation. It enhances the insurability of the program, thus benefiting both insurers and self-insurers, by making the cost more predictable. It benefits certain employers in the shipbuilding industry by restoring an original purpose of workers' compensation, namely to immunize employers from tort suits as the quid quo pro for paying compensation. It benefits the Department of Labor, which administers this program, by providing greater manpower

resources by which to adjudicate longshore cases. Finally, it benefits all participants in the compensation system by establishing new sanctions to deter those who have defrauded and abused it.

* * *

**LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT AMENDMENTS OF 1981**

TUESDAY, JUNE 16, 1981

**U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
*Washington, D.C.***

The subcommittee convened, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Hawkins.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning.

Today is the first of 3 days of hearings on the Longshoremen's and Harbor Workers' Compensation Act, and legislation that Senator Sam Nunn and I have proposed to amend Senate bill 1182.

When the act was first amended in 1972, it became a free ticket to rip off the consumer and taxpayer. So much so that in the 5 years after the changes were made, reported injuries jumped 185 percent. The chart to my right clearly shows that as benefits skyrocketed, the number of claims shot up right along with them. In 1972, 72,000 claims were filed. That number jumped to over 205,000 by 1977, meaning that nearly 1 in 5 employees filed a claim.

This act, in my opinion, has two fundamental problems; first, it is loaded with provisions that encourage

fraud and corruption. Hearings before the Senate's Permanent Subcommittee on Investigations earlier this year, concluded that the act is abused by organized crime. Our first witness today, Senator Nunn, spearheaded the investigation on waterfront corruption. I am sure he will be able to shed more light on the subject today. Second, organized crime is attracted to the act because of its more-than-generous payouts as now provided.

I believe it is important to provide sound worker's compensation, but the Longshoremen's Act has become a national disgrace at a time when commonsense seems to be finding its way back into Government. Now is the time to revamp the act in line with commonsense policy.

There are many cases that describe the absurdity of the system, which would sound like horror stories to the average working man or woman, but are commonplace on our Nation's waterfronts.

Take one of the commonplace examples from Shippers Stevedoring Co. in Houston. One of their longshoremen injured his right forearm on the job in May of last year. Because of his \$33,000 annual salary, he automatically received about \$426 a week in tax-free compensation - which was the maximum at that time. They paid him for nearly a year, and he received a total of over \$18,500. In addition to that, the man's doctor said the employee would have a 25-percent impairment for the next 61 weeks, and the company was forced to pay an additional \$26,000 during that time. So the company paid a total of nearly \$45,000 in 1 year, all of which was tax free.

But that is not all. While he was receiving the additional \$26,000 because of his impairment, he was also working in another job and was earning about \$25,000.

The total two salaries, or the money that he made that year, exceeded \$70,000 a year, \$45,000 of which was tax free.

You can see by this graph that benefit increases in the act have far outstripped the growth of related economic indexes. In many cases, the benefits often exceed an employee's preinjury take-home pay. This is ludicrous, and goes way beyond the intent of worker's compensation.

The benefits under the Longshoremen's Act have increased 551 percent from the period 1972 to the present. Benefits in 1972 were \$70; present matching benefits, \$456 – an enormous increase. At the same time, the cost of living increased 97 percent; the CPI index and the national average weekly wage also had enormous increases.

The act also includes an unlimited, annual, tax-free escalation of disability benefits; an "unrelated death benefits" clause – meaning, for example, that if a person receiving disability benefits dies from a cause unrelated to his employment or injury, like an automobile accident, his survivors receive benefits – often more than the deceased could have received had he lived; injured employees may choose their own doctors for verifying injury claims; mandatory rehabilitation is not required, and all filed claims are presumed to be valid.

Coming from managing a small business in Oklahoma, where I was directly involved in worker's compensation administration, I am appalled that the Longshoremen's Act has been allowed to flourish unabated.

Last week, the New York Times published an editorial calling for changes in the act; citing the shipbuilding industry, where insurance costs have increased ninefold

since 1970. In fact, according to recent statistics, for every \$100 in salaries, employers are compelled to pay an additional \$87.24 in compensation costs – this is in New York.

These outrageous costs are passed on to the shippers and three things are happening as a result.

First, as you can see in this diagram, many shippers are avoiding U.S. ports where they can, primarily working through Canadian ports where compensation costs are about \$5 for every \$100 in salaries. This needs to be compared to what they are in New York. For example, in the chart, it shows St. John, New Brunswick, where the rates presently are \$3.40 per \$100 of compensation. Compare that to only 400 miles south, in New York, the rates are \$87. So if my math is somewhat correct, we are looking at almost 30 times the rate in New York for compensation costs as compared to what it is in Canada.

It is little wonder that shippers would go that 400 miles to save on such a tremendous burden. And for those who are not familiar with workers' compensation, when we talk about \$87 per \$100 of payroll, we are talking about if the employer pays an individual \$20,000 he has to pay \$16,000 to \$17,000 in workers' compensation costs. We are saying 87 percent of compensation has to be paid in workers' compensation premiums.

Over 7 million tons of cargo were diverted through Canada in 1976 through 1979, which amounted to a little over \$9 billion. Mexico will soon be in the business, as they are also building and expanding their ports.

Second, and very importantly, when business is diverted out of this country, jobs are lost. Entire companies

can go out of business, and the whole Nation suffers as a result.

Another example of the act's depressive effects is here, in Washington, D.C., where all private employees are covered by the act. It is estimated that for every mile of track laid in the D.C. Metro system, employers paid \$1.9 million in workers' compensation. Compensation rates in the District are several times higher than in neighboring Maryland or Virginia, even though this country has one of the cleanest records of work-related injuries and illnesses. If every State's compensation program was operated like this, few businesses would be able to survive.

Third, all consumers are affected by the act. It is estimated that Longshore compensation costs can push up the wholesale price of an item by as much as 25 percent. Every additional cost is passed directly to you and me. The Government has turned its back on every consumer by not acting to correct the injustices in the act.

The act must be amended for purely economic reasons. My criticism is directed at the Government for allowing the act to mushroom beyond original intent, and against those groups or individuals who abuse the law for personal benefit. The legislation under consideration would help restore balance by removing obvious inequities, significantly reduce fraud and corruption, aid ailing U.S. port authorities, and assure prompt delivery of generous compensation benefits and medical treatment to those deserving injured employees.

**OVERSIGHT ON THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT, 1980**

TUESDAY, SEPTEMBER 16, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr., (chairman) presiding.

Present: Senator Williams.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. Come to order.

Today we are holding oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

The committee has been aware and concerned for some time about employer dissatisfaction with the functioning of the Longshore Act. I and other members of the committee have received substantial correspondence on this subject, and we have held a number of meetings with representatives of covered employers. As long ago as May and June of 1979, I had the opportunity to meet with representatives of stevedoring companies in New Jersey and to visit facilities at Port Newark and Port Elizabeth in New Jersey.

We have also been monitoring hearings on the Longshore Act conducted by committees in the House of Representatives. House committee hearings from the 95th

Congress alone took 17 days, and the printed report of those hearings is nearly 1,900 pages long.

We have also been following the hearings held in the House this year, and have had an opportunity to review the testimony presented there, although the formal hearing record has not yet been published.

With this extensive background of consideration of employer concerns about the act, I am hopeful that today's hearings will be well focused on the most important issues that have been raised concerning the act.

We are pleased that we will have an opportunity to hear this morning from Assistant Secretary Elisburg. The Department of Labor plays a special role in interpreting and administering the act, and it will be helpful to receive the Department's views on the issues that we will be considering.

We will also be pleased to hear from the unions representing workers protected by this act.

* * *

App. 79

STATEMENT

on

LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT REFORM

for submission to the

SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

for the

CHAMBER OF COMMERCE OF
THE UNITED STATES

by

Eric J. Oxfeld*

September 26, 1980

The Chamber of Commerce of the United States is pleased to have the opportunity to comment on the Longshoremen's and Harbor Workers' Compensation Act in connection with general oversight hearings on the Act conducted by the Senate Committee on Labor and Human Resources.

The U.S. Chamber is the world's largest business federation, composed of more than 101,000 members, including 97,000 business firms, 2,700 state and local chambers of commerce in the United States and abroad, and 3,300 trade and professional associations.

The serious flaws of the Longshore Act are having an adverse affect on every business member of the Chamber.

* Associate Director, Employee Benefits, Chamber of Commerce of the United States

As employers, many Chamber members now are required to provide workers' compensation coverage for their employees under the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act), and many other members could find themselves in the same circumstance as a result of judicial decisions expanding the Act's jurisdiction. Furthermore, because the Longshore Act frequently is touted as a model for state workers' compensation systems, every business member of the Chamber has an interest in the Act. As a private employer located in the District of Columbia, the Chamber itself is under the jurisdiction of the Act.

This statement focuses on identifying the defects in the Longshore Act. We are cognizant that several bills to amend the Act are pending in Congress, and we will comment on the specifics of those proposals at a later time. Nevertheless, we do wish to call the Committee's attention to one bill, H.R. 761D, which would remedy many of the flaws in the Act.

The multitude of problems that employers presently under the Act are experiencing is of concern to all employers nationwide. The Chamber, which has long been working to maintain a fair and effective workers' compensation system, therefore must ask Congress to enact some sorely needed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

CHAMBER POSITION

The Chamber shares the committee's hopes for a modern workers' compensation system for the maritime industry and for the District of Columbia, a system that meets the needs of today's work environments. The

Longshoremen's and Harbor Workers' Compensation Act, however, does not meet those needs as the Act presently is worded, interpreted, and administered.

The purposes of the Longshore Act are to provide fair, certain, adequate, and prompt job-disability benefits to persons in certain maritime industries – longshoremen and harbor workers – and a few groups of workers not otherwise covered by state workers' compensation laws.

As a result of oversights by legislative draftsmen and a misguided notion of fairness and adequacy when the Act was drafted, coupled with maladministration, judicial misinterpretation, and continual double-digit inflation, the Longshore Act has deteriorated from a "model" law to a national scandal. Despite commendable efforts by the labor Department to reduce the backlog of pending claims and to improve over-all administration, the Longshore program remains notorious for being dilatory in the delivery of benefits ineffective in weeding out questionable claims, and exorbitantly expensive for employers. These problems have convinced us that if the current situation is left unchanged, some employers may be forced to go elsewhere (i.e., to Canada or Mexico), go "bare" (i.e., fail to insure), or go under (i.e., out of business).

* * *

SERIOUS DEFECTS IN LONGSHORE ACT

The 1979 Cooper* study of the Longshore program confirmed that "very liberal benefits" coupled with "a

* Cooper and Company, *Insurance Arrangements Under the Longshoremen's and Harbor Workers' Compensation Act, Phase I Draft Final Report* (Stamford: 1979).

propensity to make and exaggerate claims" are causing "serious problems." Specifically, employers are experiencing severe problems with benefits, the physician selection process, the lack of vocational rehabilitation, persistent maladministration, and a perplexing set of jurisdictional guidelines. It is not hard to understand why the Longshore program is so exorbitantly expensive.

I. Inadequacies of Benefits System

- *Wage replacement ratio* – Workers' compensation cash benefits are intended to replace a proportion of income lost (wage replacement ratio) because of job-related disability or death. These benefits are provided at the employer's expense, tax-free to the recipient. The wage replacement ratio used almost universally is two-thirds of pre-injury wages, which originally was thought to provide an adequate level of income without creating disincentives to return to work upon recovery.

At present, however, a replacement ratio of two-thirds results in a windfall for higher paid workers. Inflation, the progressive income tax, and the advent of the dual income family are the reasons – as family income increases, workers are bumped up to higher tax brackets, and two-thirds of gross wages *tax-free* can easily exceed pre-injury take-home pay. With other economic savings factored in – the cost of transportation, meals, etc. – the incentive to abuse the system is high indeed. When benefits from other sources – i.e., Social

Security, pensions, sick leave, welfare, and so on – are paid as well, Longshore benefits can become a bonanza for not working.

- *Maximum benefit* – Only one state, Alaska, has a higher maximum benefit than the Longshore Act. Effective October 1, 1979, the maximum weekly benefit under the Act is \$426, which represents the benefit paid to a person whose annual income is well over \$33,000. These benefits will be increased again in just a few weeks. The average individual annual income for the United States is \$12,144 and \$16,145 for the District of Columbia (1978 statistics). The Longshore maximum, therefore, is far out of line with salaries.
- *No maximum on death benefits* – The Supreme Court, in its wisdom, has ruled in *Rasmussen v. Director of OWCP* that, contrary to 50 years of practice under the Longshore Act, there is no upper limit on death benefits. The surviving dependents, therefore, receive weekly benefits equal to two-thirds of pre-accident weekly wages, tax-free, no matter how much the deceased worker was earning. No state system pays death benefits without any maximum whatsoever. The absence of any upper limit makes prediction of insurance losses highly speculative, pushing costs up to cover "worst case" situations.

- *Unlimited COLA* – The Longshore Act is one of a very few workers' compensation systems that automatically grant benefit increases to persons already receiving benefits, to accommodate changes in the cost of living. The cost-of-living adjustment (COLA) is pegged to increases in the national average weekly wage. In order to insure COLA benefits

* * *

**OVERSIGHT HEARINGS ON THE LONGSHORE-
MEN'S AND HARBOR WORKERS' COMPENSA-
TION ACT, 1980**

TUESDAY, NOVEMBER 13, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LABOR STANDARDS,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2261, Rayburn House Office Building, Hon. Edward P. Beard (chairman of the subcommittee) presiding.

Members present: Representatives Beard, Williams, Erlenborn, and Edwards.

Staff present: Earl F. Pasbach, staff director; Edith Baum, minority counsel; Bruce Wood, minority counsel; Dorothy L. Strunk, minority staff assistant; Mary Lou Granahan, Carole DiDomenico and Morton Blander, staff assistants.

Mr. BEARD. The Subcommittee on Labor Standards will now come to order.

Good morning, ladies and gentlemen; I am Congressman Beard, chairman of Labor Standards Subcommittee.

Today will begin 5 days of oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

There has been much controversy about this act. Many have called for changes and I look forward as chairman, along with others on this committee, to hearing

the testimony of the various individuals who will testify on behalf of groups, organizations, and so on.

* * *

**STATEMENT OF HON. JOHN N. ERLNBORN,
A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF ILLINOIS**

Mr. ERLNBORN. Mr. Chairman, if I might ask the committee merely to accept my statement for the record, I trust my colleagues will read it carefully and I will save the time of the subcommittee.

Mr. BEARD. Thank you. It will be incorporated into the record, Mr. Erlenborn.

[The prepared statement of John Erlenborn follows:]

**PREPARED STATEMENT OF
HON. JOHN N. ERLNBORN, REPRESENTATIVE
IN CONGRESS FROM THE STATE OF ILLINOIS**

**THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT**

Mr. Chairman, as the ranking Republican of the Subcommittee on Labor Standards and the chief sponsor of legislation to amend the Longshoremen's and Harbor Workers' Compensation Act, I am particularly pleased you have decided to hold hearings on the serious problems associated with this Act.

These hearings, I am confident, will buttress the extensive record already compiled by the Compensation, Health and Safety Subcommittee's examination of the Act during 17 days of hearings in the 95th Congress. Those hearings highlighted the difficulties in administration and shortcomings in the legislation itself which have had

adverse consequences to employers and insurers and to employees in that the Act does not mandate rehabilitation, nor do the Act's liberal benefits encourage rehabilitation and the return to work.

Now that our Subcommittee has jurisdiction over the Longshore Act, we bear the responsibility, however unpleasant, of correcting its many deficiencies. As a basis for our discussions in this regard, I have introduced H.R. 2448, which is virtually the same as H.R. 13593 introduced by Congressman Ruppe in the 95th Congress.

The most significant amendments since the Act's passage in 1927 occurred in 1972. The central purposes of the Amendments were to eliminate third party suits based on the admiralty doctrine of "unseaworthiness" and consequent indemnity actions against employers covered by the Act, and to raise benefit levels for employees.

However, as all of us now know, more - much more - was accomplished by this legislation. It is unfortunate, indeed, that Assistant Secretary of Labor Elisburg, who has responsibility over the Longshore Act and who played so prominent a role as a Senate aide in drafting the 1972 amendments may not testify at our hearings.

Questions over whether and how to compensate employees injured in maritime activities proximate to navigable waters have spawned litigation for most of this century. Finally, by 1972, the courts were able to well-define jurisdiction under the Act. The ensuing respite was short-lived, as the 1972 amendments re-opened a Pandora's box of litigation. The Amendments, as well as subsequent Labor Department and court determinations, have resulted in uncertain parameters governing employer liability. Indeed, an employer's liability now is so speculative

as to make insurance required by the Act extremely expensive, if not unobtainable.

The explosion in litigation and costs relative to the 1972 Amendments has stemmed more specifically from an extension of the Act's jurisdiction – uncertain in scope – payment of benefits from deaths unrelated to employment, absence of a ceiling on death benefits, and an uncapped escalation of benefits geared to increases in the national weekly wage.

The Act's imprecision has brought complaints from the Federal judiciary. In the [illegible] case, decided in 1977, the Chief Justice termed the Act "... about as unclear as any statute could conceivably be ...," to which the lawyer for the government replied with unsurpassed understatement, "It leaves something to be desired." Clearly, when the Federal judiciary repeatedly states its difficulty discerning Congressional intent, Congress should re-examine the law and restate its intent clearly and concisely. That, I am sure, will be the central message of these hearings and is one matter addressed by H.R. 2448.

The Federal courts have also stated that the 92nd Congress did not undertake any study of what the total impact and costs of the 1972 amendments would be on the employers or the nation as a whole. Premiums for insureds and costs to self-insured employers have skyrocketed. For example, in 1972 the premiums established by the New York State Compensation Rating Board for general stevedoring was \$29.90 for every \$100 of payroll. Today that rate is \$87.24 per \$100 of payroll, which translates to an actual payment of \$261 per employee per week – over \$13,000 per employee per year. A recent government report indicates that for all U.S. industry the average cost

of workers' compensation is \$1.50 per \$100 of payroll and the average cost nationwide for the stevedoring industry is \$50 per \$100 of payroll. A recent study shows that 6 per cent of gross industry revenue was spent on Longshore Act compensation.

Each year, benefits rise steadily, due to indexing based on the nationwide average weekly wage. There is no limit to the annual escalation, and the benefits are tax-free. The maximum weekly compensation in 1972 was \$70 — now it is \$426. It is claimed that the automatic escalation feature of the Act by itself makes liability so unpredictable as to be uninsurable. It is also stated that, because of the uncapped escalator, reinsurance is difficult to obtain. H.R. 2448 would limit the escalator to 3 per cent each year, but many suggest that the inflationary escalator should be eliminated completely.

The concept of workers' compensation is to replace on injured worker's lost earnings. However, the Act contains "unrelated death" provisions which give full death benefits to survivors of injured workers who are collecting benefits for permanent total disability but who later die from causes totally unrelated to the industrial accident. One can only imagine how this concept of life insurance crept into a worker's compensation statute. To my knowledge, no other workers' compensation law, state or federal, includes such a provision. H.R. 2448 would eliminate this inequity.

Another feature of the 1972 amendments was removal of a uniform limitation on death benefits. The Act now permits survivors or injured workers to receive more in benefits than the injured worker would have, had he lived. I am told no other compensation law contains this premium

on death. Many, including the Secretary of Labor, claim the exclusion of the uniform limitation was a mistake or an oversight in 1972. Despite his assertion, the Supreme Court in the 1979 *Rasmussen* decision held that Congress deliberately removed any uniform limitation in the 1972 Amendments. H.R. 2448 would limit death benefits to the same rate as compensation benefits, are limited, to a maximum of 200 per cent of the average weekly wage.

One final thought: While all the problems with the Act I have cited must be addressed in any serious re-examination of the Act, implicitly this Subcommittee also must consider two, more fundamental, issues. First, what is the purpose of disability compensation? Is it merely to replace lost wages – the initial purpose of workers' compensation – or is it to be a broadened concept, in which principles of life insurance, pensions, and punitive damages are infused? Certainly, the Longshore Act presently recognizes this broadened concept.

Second, is it appropriate to retain the ultimate administrative determination of compensation under the Act in the Benefits Review Board, a unit of the Department of Labor which is, in effect, under the control of the Secretary of Labor? I find this politicizing of benefits unsettling. Indeed, it is yet one more source of the unpredictability which permeates the Act. Accordingly, H.R. 2448 removes the jurisdiction of the Board over Longshore Act cases. Initial compensation determinations would continue to be made by district commissioners – civil service employees – with appeal to the Federal district courts.

Assistant Secretary Elisburg testified that there has been no comprehensive review of the Act since its passage in 1927, even in view of the 1972 changes. This subcommittee

has the responsibility to take this step and to propose the legislative remedies necessary to make the Act fair to all parties and the liabilities under it insurable, predictable, and affordable to employers subject to it. I hope we will meet our obligation.

* * *

**OVERSIGHT HEARINGS ON THE LONGSHORE-
MEN'S AND HARBOR WORKERS' COMPENSA-
TION ACT**

Part 2

TUESDAY, MAY 2, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:20 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, and Zeferetti.

Staff present: Paul F. Dwyer, counsel to the subcommittee; Edith C. Baum, minority counsel for labor; Bernard Mandella, staff director to the subcommittee; Marsha A. Gray, staff assistant; and Terre H. Belt, writer/researcher.

Mr. GAYDOS. The Subcommittee on Compensation, Health and Safety will come to order.

I would like to welcome my colleague, Mr. Young, from the distinguished Rules Committee, and I think we can proceed. You can introduce your constituent, Congressman. I know you have a very busy schedule.

**STATEMENT OF HON. JOHN YOUNG,
A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF TEXAS**

Mr. YOUNG. I do thank you, Mr. Chairman. It is an honor and a privilege for me to be here before you and this committee.

The Subcommittee on Compensation, Health and Safety in my judgment is very courageously undertaking to sort out one of the most difficult and complex problems existing between the admixture of admiralty jurisdiction and State jurisdiction on this very important question of compensation of people working on vessels. It has been a problem for years, for many reasons that the committee knows about and that I won't take the time of the committee on.

* * *

B. With Respect to L & H Claimants?

With respect to Longshore and Harbor Workers' claimants we set the same goals, provide the same opportunities but do not get the same results we get on state cases. We feel this is due to lack of motivation to return to work because of the monetary gain built into the high compensation rate. We have been discouraged by one of the better pain clinics from admitting longshore and harbor workers' cases because of poor results which they attribute to the secondary gain caused by the federal law. This is a clinic that normally gets good results and gets patients back to work. Most of the longshoremen are men who do not want to change vocations, as they would make less than when drawing compensation.

Case Example 1 - A 57 year old longshoreman with a back injury made \$300 a week from compensation. His pain continued despite being sent to a pain clinic, receiving medication and exercises. He refused to follow a program at home. When vocational rehabilitation was suggested his pain got worse. He mentioned to his rehabilitation nurse that only money would cure his pain. The claimant is now trying to settle with him.

Case Example 2 - A 35 year old fork lift operator received a partial foot amputation. He was fitted with a partial foot prothesis. He was able to walk and drive. When vocational rehabilitation was mentioned, he said he was not smart enough and that he did not want a new trade at less money.

We do have one 60 year old amputee who is going to school in electronics. Another longshoreman is up for vocational evaluation and one is being set up for schooling. Our goal on the longshore and harbor act cases are to control the medical cases as best as possible and prevent potential complications. Based on these goals our results are good.

- C. How do you think the Longshore and Harbor Workers' Act can be improved to return more claimants to work and get them off the compensation rolls?

Make the employer part of the rehabilitation team by providing the injured worker a job he can handle while partially disabled before being released to return to work to full duty. The possibilities of returning to work improve considerably if the compensation payments are limited in amount and/or duration to eliminate the secondary gain of being off work.

* * *

**OVERSIGHT HEARINGS ON THE LONGSHORE-
MEN'S AND HARBOR WORKERS' COMPENSA-
TION ACT**

Part 1

MONDAY, SEPTEMBER 26, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met at 10:07 a.m., pursuant to call, in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Le Fante, and Corsell.

Staff present: Paul F. Dwyer, subcommittee counsel; Marsha Gray, staff assistant; and Richard Mosse, assistant minority counsel.

MR. GAYDOS. The Subcommittee on Compensation, Health and Safety will be in order.

The record will show that there are two members of the committee present, and others are on their way. I apologize to the first group of witnesses on the panel that we didn't start on time but Monday morning is very difficult for this committee and other committees because members are returning from districts scattered throughout the entire country.

On behalf of the committee I want to thank you for your appearance here today. I request you to make your

presentation in the manner you deem best and which would be most suitable to you. You may summarize your testimony or you may read it. First, without objection, the submitted testimony will become a formal part of the record of the proceedings before this committee.

* * *

**STATEMENT OF ROBERT GALLOWAY,
EXECUTIVE VICE PRESIDENT,
SUN SHIPBUILDING & DRY DOCK CO.**

Mr. Galloway. Sun Shipbuilding & Dry Dock Co. is located in Chester, Pa., on the Delaware River, 10 miles south of Philadelphia. We employ 4,300 individuals and have been building oceangoing commercial vessels since 1916. Our specialty has been tankers, roll-on/roll-off ships, ship repair work, and a variety of heavy fabrications for industrial use. Some of our projects that might be familiar to you have included the conversion of the SS *Manhattan* from a tanker to an icebreaker which successfully navigated the Northwest Passage to Alaska. We also built the *Hughes Glomar Explorer* which gained notoriety for its role with the CIA in attempts to salvage a Russian submarine from the floor of the Pacific Ocean.

* * *

ECONOMIC INCENTIVES

The act now provides benefits calculated at 66⅔ percent of average annual wage. This money is tax free. In our yard an individual would have deductions from gross wages like federal income tax, 20 percent; social security; Pennsylvania State tax; City of Chester tax; union dues, travel, lunch, et cetera, which I put in at 3 percent. These amount to 31.85 percent.

This means he is taking home only 68 percent of gross pay. Workers' compensation pays him 66½ percent. We are not arguing for a change in benefit level but we are asking that you understand what this does to an individual. The work ethic has changed in the last decade and there is no incentive, economic or otherwise, for some to return to work. Doctors extend excused disability at a patient's request. The net result is many individuals who would otherwise be active and productive human beings are put on a shelf for life.

An employee of ours on workers' compensation has moved to Florida and has refused to accept rehabilitation twice recommended by his own doctor. We referred the matter to the Florida office who have advised that they will not pursue the case. Kenneth Ailsworth, chief of rehabilitation in Jacksonville, writes that: "Rehabilitation is an option available to the injured worker." This worker declines the option and the case is filed. Sun Ship's weekly payments continue.

Do you realize that individuals have collected social security, company pension, unemployment compensation, and workers' compensation simultaneously?

Where do we go from here?

We have an active and vigorous safety program at Sun Ship. We continually introduce the use of new safety devices, continue to educate our employees, and even use disciplinary measures to enforce safety rules. But, we have no control over heart attacks, hearing loss outside the yard and other nonwork related problems. We have no control over our employees lives in areas like exercise, weight control, smoking, and diet, et cetera. Yet we are asked to assume financial responsibility in the form of workers' compensation for any possible casual relationship between

the work environment and the health of the employee, even if no accident has occurred.

Our experience at Sun Ship is typical of the industry. Costs have risen from \$175,000 in 1972 to \$1,156,000 in 1976. Mr. Hood mentioned one other shipyard on the east coast as being three times. Ours are six times. He mentioned in 1980 a prediction, that it would be 16 times. I think ours are going to be closer to 25 times.

I have tried to outline why this has happened. We have no place to put these costs but to add them to the cost of the product. This makes it harder to sell ships in a world market and increases the woes of an already troubled industry which the Federal Government has declared an industrial capability our country must maintain.

I started these remarks with a statement as to whether or not we have an act at all. I hope that I have given the committee one shipbuilder's viewpoint on the confusion, inequities, and outright mismanagement of workers' compensation laws and employee benefit programs under which employers like Sun Ship are forced to do business.

I have to say I only pointed out some of the gross defects which are in the present act. Others will follow. These include: 1. Presumption and resolution of doubts; 2. loss of wage earning capacity; 3. preexisting conditions; 4. death cases; and 5. incentives and rehabilitation.

I urge this committee to call upon your colleagues in the House and Senate to bring about legislation to correct the disgrace and injustice caused by the Federal Longshoremen's and Harbor Workers' Act.

App. 99

Thank you for the opportunity to appear before the
committee today.

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT

TUESDAY, NOVEMBER 27, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LABOR STANDARDS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2261, Rayburn House Office Building, the Honorable Edward P. Beard (chairman of the subcommittee) presiding.

Members present: Representatives Beard and Erlenborn.

Staff present: Earl F. Pasbach, counsel; Carole DiDomenico, staff assistant; Morton Blender, staff assistant; Edith Carter Baum, minority counsel for labor; Dorothy Strunk, assistant minority counsel for labor; and Bruce Wood, assistant minority counsel for labor.

Mr. BEARD. Good morning, I am Congressman Beard, chairman of Labor Standards, and this is one of a series of hearings we have had on the Longshoremen's and Harbor Workers' Compensation Act.

The first witness will be Mr. John C. Swanson, attorney for Metro.

Mr. Swanson, do you have a prepared statement?

Mr. SWANSON. Yes, I do, and I believe I turned it in.

Mr. BEARD. Your statement will be incorporated in the record in total, and we would appreciate it if you could summarize.

STATEMENT OF JOHN C. SWANSON, ATTORNEY,
WASHINGTON METROPOLITAN AREA TRANSIT
AUTHORITY (METRO)

Mr. SWANSON. Thank you very much. My name is John Swanson. I am representing the Washington Metropolitan Area Transit Authority - Metro. Metro was created by interstate compact by and between Maryland, Virginia, and the District of Columbia. Its primary function is to plan, develop, and to finance and provide for the operation of a rapid rail transit system serving the Washington metropolitan area.

As an employer located in the District of Columbia, Metro comes under the provisions of the Longshoremen's and Harbor Workers' Act. This act, though specifically designed to provide workers' compensation benefits to those individuals who are employed in maritime occupations on and around the docks and marine facilities of the United States has, since 1928, been the basis for claims in a city with little or no maritime employment. This misapplication subjects the District of Columbia to a workers' compensation

* * *

- c. Three of the seven actually enter a rehabilitation program. One and a fraction of the three are not rehabilitated for various reasons, among them being absenteeism and refusal of help due to family and educational problems. What percentage does each category constitute?

Response:

Cases were closed not rehabilitated in FY 1979 for the following reasons:

1. Thirty-one percent had a medical exacerbation.
2. Nineteen percent lost interest.
3. Eighteen percent refused to change unrealistic expectations.
4. Eleven percent dropped out and refused further contact.
5. Eight percent settled their case.
6. Six percent returned to a job that will cause further medical problems.
7. Four percent developed educational problems and refused help.
8. Two percent developed family problems and refused help.
9. One percent returned to the pre-injury job.
10. Zero percent had excessive absenteeism.

- d. One and a fraction of the three who enter a rehabilitation program are rehabilitated. Overall, you indicated that of 40 of 100 injured workers referred to a rehabilitation specialist, three enter a rehabilitation program and one and a fraction are rehabilitated. Has there been improvement in these percentages over the past 18 months?

Response:

There has been improvement in the number of people rehabilitated. Cases rehabilitated in FY 1978 were 1.5% of cases being compensated. Cases rehabilitated in FY 1979 were 1.7% of cases being compensated and cases rehabilitated in the first quarter of FY 1980 were 1.9% of cases being compensated.

- e. In any case, should a workers' compensation program sanction refusal to enter, participate in, and complete a rehabilitation program where an injured worker has been evaluated as rehabilitative?

Response:

If the Act were to require the employer to pay temporary total compensation during the rehabilitation effort, then it should also require the injured worker to participate in rehabilitation.

* * *

33 U.S.C. § 902(10) states:

*"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).**

* 33 U.S.C. § 910(d)(2) refers to retired workers and is not at issue in this case.

33 U.S.C. § 906(b)(1) states: "*Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).*" (italics in the original)

33 U.S.C. § 908(a) states:

Compensation for disability shall be paid to the employee as follows: (a) Permanent total disability: In case of total disability adjudged to be permanent $66 \frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

33 U.S.C. § 908(b) states: "Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof."

33 U.S.C. § 908(e) states:

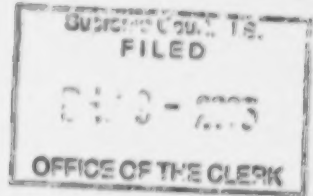
Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 939(c) states:

(1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such service available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in State or Territories, possession, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this Act to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 44 in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the cost of administering this subsection.

7



No. 05-371

In The
Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF FOR THE LONGSHORE INSTITUTE, INC. AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

THOMAS C. FITZHUGH III

Counsel of Record

MATTHEW H. AMMERMAN

NICHOLAS W. EARLES

FITZHUGH, ELLIOTT & AMMERMAN

12727 Kimberley Lane, Suite 302

Houston, Texas 77024-4053

(713) 465-7395

Counsel for Amicus Curiae,

The Longshore Institute, Inc.

TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	6
1. The OWCP has created an extra-statutory award of benefits that conflicts with the Congressional definition of "disability" found in the LHWCA...	6
2. The Director, OWCP's vocational rehabilitation procedures and the decision below impermissibly allow a District Director to make findings of disputed fact.....	9
3. The problem created below - total disability awards based solely on a claimant's participation in vocational rehabilitation - will only increase ..	9
4. The Director, OWCP's award of vocational rehabilitation benefits violates the Congressional policy enacted in the 1972 Amendments to the LHWCA.....	11
5. The system approved below evades both effective Congressional and judicial oversight and requires this Court's action to correct the errors inherent in the current program.....	12
6. The program approved below has been consistently applied in a manner inconsistent with the applicable federal regulations.....	14

TABLE OF CONTENTS -- Continued

7.	The Ninth Circuit's decision creates a perverse incentive for workers to seek public resources in lieu of returning to work with the employer or in suitable alternative employment.....	15
CONCLUSION.....		18

TABLE OF AUTHORITIES

CASES

<i>Crowell v. Benson</i> , 285 U.S. 22 (1932).....	11
<i>Director, OWCP v. Greenwich Collieries</i> , 512 U.S. 267 (1994).....	9
<i>General Construction Co. v. Castro</i> , 401 F.3d 963 (9 th Cir. 2005).....	6, 13, 17
<i>Healy Tibbits Builders, Inc. v. Cabral</i> , 201 F.3d 1090 (9 th Cir. 2000).....	9, 11
<i>Louisiana Insurance Guaranty Association v. Abbott</i> , 40 F.3d 122 (5 th Cir. 1994).....	4, 15
<i>Metropolitan Stevedore v. Rambo [Rambo II]</i> , 521 U.S. 121 (1997).....	7
<i>Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]</i> , 315 F.3d 286 (4 th Cir. 2002).....	10, 18
<i>Pearce v. Director, OWCP</i> , 603 F.2d 763 (9 th Cir. 1979).....	3
<i>Pillsbury v. United Engineering Co.</i> , 342 U.S. 197 (1952).....	8
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980).....	3, 8

TABLE OF AUTHORITIES -- Continued

STATUTES AND REGULATIONS

Administrative Procedures Act, 5 U.S.C. §§ 500-96.....	9, 10, 13
Defense Base Act, 42 U.S.C. §§ 1651-55.....	1, 3, 5
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50.....	1, 2
LHWCA § 2(10), 33 U.S.C. § 902(10).....	6
LHWCA § 8(c)(1)-(c)(20), 33 U.S.C. § 908(c)(1)-(c)(20)...	7
LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2).....	6
LHWCA § 8(c)(22), 33 U.S.C. § 908(c)(22).....	7
LHWCA § 19(d), 33 U.S.C. § 919(d).....	9, 12
LHWCA § 39(c)(2), 33 U.S.C. § 939(c)(2).....	8, 10, 14, 16
LHWCA § 44(c), 33 U.S.C. § 944(c).....	14
LHWCA § 44(i)(2), 33 U.S.C. § 944(i)(2).....	16
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.....	11
Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73.....	1, 3

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56.....	1, 3
TABLE OF AUTHORITIES -- Continued	

War Hazards Compensation Act, 42 U.S.C. §§ 1701-6.....	1, 3, 10
20 C.F.R. §§ 702.501-702.508.....	8, 15
20 C.F.R. § 702.501.....	15
20 C.F.R. § 702.506.....	15, 16
20 C.F.R. § 702.507.....	8

OTHER AUTHORITY

<i>Boucher v. Richmond Dry Dock Co.</i> , 29 BRBS 713 (ALJ)(1995).....	10
<i>Brown v. National Steel & Shipbuilding Co.</i> , 34 BRBS 195 (2001).....	10, 15
<i>Bush v. I.T.O. Corp.</i> , 32 BRBS 213 (1998).....	10, 15, 17
<i>Castro v. General Construction Co.</i> , 37 BRBS 65 (2003).....	10, 14
<i>Clark v. Chugach Development Corp.</i> , BRB No. 04-890 (August 18, 2005) (unpublished).....	17
<i>Edmonds v. Al Salaam Aircraft Co.</i> , 35 BRBS 168 (ALJ)(2001).....	10

<i>Goicochea v. Wards Cove Packing Co.</i> , 37 BRBS 4 (2003).....	10, 13
---	--------

TABLE OF AUTHORITIES -- Continued

<i>Gregory v. Newport News Shipbuilding & Dry Dock Co.</i> , 32 BRBS 264.....	16
<i>Meinert v. Fraser, Inc.</i> , 37 BRBS 164 (2003).....	13
<i>Oberts v. McDonnell Douglas Services/Boeing</i> , 39 BRBS 117 (ALJ)(2005).....	10
H.R. Rep. No. 92-1441, <i>reprinted in</i> 1972 U.S.C.A.A.N. 4698.....	11, 12

BRIEF FOR THE LONGSHORE INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS¹

The Longshore Institute, Inc., as *amicus curiae*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTEREST OF THE *AMICUS CURIAE*

The Longshore Institute, Inc. ("TLI") is an association dedicated to the proper administration of the Jones Act, 46 U.S.C. app. § 688, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50, and the extensions of the LHWCA, viz., Defense Base Act,² 42 U.S.C. §§ 1651-5; Outer Continental Shelf Lands Act,³ 43 U.S.C. §§ 1331-56; Nonappropriated Fund Instrumentalities Act,⁴ 5 U.S.C. §§ 8171-3; and, the War Hazards Compensation Act,⁵ 42 U.S.C. §§ 1701-6. Established in 1995, its goals are to educate claims professionals, risk managers, judges, attorneys (both claimant and defense), longshore employers and insurers on the proper procedures and application of the LHWCA and recent developments in current law and regulations through educational programming and the reporting and analysis of all decisions by any court, including the Benefit Review Board, that affect the LHWCA.

¹ All parties have consented to the filing of this brief. Petitioner and Respondent have indicated their consent by filing a blanket consent for all *amicus curiae* with this Court. The Solicitor has specifically consented and the Solicitor's consent letter is filed contemporaneously with this brief. This brief was not authored, in whole or in part, by counsel for any party. No person or entity other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation of this brief.

² 42 U.S.C. § 1651(a) (incorporating the LHWCA).

³ 43 U.S.C. § 1333(b) (incorporating the LHWCA).

⁴ 5 U.S.C. § 8171(a) (incorporating the LHWCA).

⁵ 42 U.S.C. § 1702 (incorporating the LHWCA).

To that end, TLI offers seminars and workshops covering the claims administration procedures, statutes, regulations, and case law decisions construing and governing the LHWCA; publishes and distributes materials discussing recent developments and LHWCA decisions, including the only national periodical devoted to the LHWCA (*The Longshore Newsletter*); publishes the standard reference on the LHWCA and claims procedures (*The Longshore Procedure Manual*); and collects, publishes and distributes a comprehensive collection analyzing published and unpublished decisions of the Benefits Review Board, the administrative appellate court charged with the adjudication of immediate appeals from decisions of the Office of Administrative Law Judges (*Brahm's Court Index*).

Since its inception in 1995, TLI has presented approximately 75 seminars to thousands of persons in locations across the United States, including approximately 25% of the sitting administrative law judges hearing LHWCA claims before the U.S. Department of Labor. In this manner, TLI is in a unique position to interact with persons from all across the nation who are working day in and day out with the LHWCA and gain the benefit of their experiences and concerns.

SUMMARY OF THE ARGUMENT

This case presents an important issue of federal law concerning the administration of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50, and the disregard for the procedures Congress created for awarding benefits by the U.S. Department of Labor, Office of Workers' Compensation Programs ("OWCP"), to award benefits. The LHWCA is far-reaching -- it extends to private

defense contractors' workers in Iraq,⁶ workers in offshore oil production,⁷ and contractors at in-country military bases.⁸ For simplicity, we will use "LHWCA" to also describe all of the federal statutes that apply it by extension.

The Ninth Circuit's decision in this case legitimizes the OWCP's extra-statutory award of benefits through its vocational rehabilitation program. This is not authorized by any regulation or through rule-making. This award system was never approved by Congress, and upsets the adjudicatory balance created by the LHWCA. The practical effect of this unauthorized award is increased cost of coverage to the federal government and private business because of a vocational program with limited oversight (without the scrutiny of the litigation process or Congress) for limited results. This is not just a concern for private insurers. The War Hazards Act extension provides for the federal government to reimburse the cost of claims for workers injured by war risks in Iraq from federal funds. Therefore, extending unauthorized benefits significantly impacts the public fisc.

Ignoring this Court's interpretation of the LHWCA in *Potonac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 281 (1980), the Ninth Circuit has redefined "disability," in the LHWCA, departing from the definition enacted into law by Congress. Congress defined disability

⁶ The Defense Base Act is an extension of the LHWCA that makes the LHWCA applicable to employment injuries sustained by employees of private contractors working outside the United States for U.S. government defense contractors. 42 U.S.C. §§ 1651(a) - 1651(f); *Pearce v. Director, OWCP*, 603 F.2d 763, 769 (9th Cir. 1979). The War Hazards Act is an extension of the LHWCA that provides for reimbursement to private insurers from the federal government if the overseas injury was caused by a war hazard risk. War Hazards Compensation Act, 42 U.S.C. §§ 1701-6.

⁷ Outer Continental Shelf Lands Act,⁷ 43 U.S.C. §§ 1331-56

⁸ Nonappropriated Fund Instrumentalities Act,⁸ 5 U.S.C. §§ 8171-3

alternately as a decrease in wage earning capacity due to the injury or as a set period of weeks for scheduled injuries. The decision below mandates awards of total disability benefits to workers regardless of the nature of their injury or their actual level of economic disability. This additional, extra-statutory award of compensation extends benefits beyond the comprehensive scheme enacted by Congress.

Beginning with *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994), federal courts have upheld the award of total disability benefits to injured workers enrolled in OWCP-approved vocational rehabilitation programs. Such awards are not authorized by the text of the LHWCA. The *Castro* decision represents a radical expansion of *Abbott*. What originated as temporary monetary support for an injured workers' whose only employment opportunities were at minimum wage has been transformed into a *de facto* award of compensation created out of whole cloth.

The decision below blurs the clear line drawn by Congress between administrator and adjudicator under the LHWCA. In 1972, Congress amended the LHWCA and expressly divided administrative and adjudicative functions between two independent agencies, the District Director, OWCP (11 across the U.S.) and the OALJ. The *Castro* decision represents a return towards the pre-1972 LHWCA where a non-judge bureaucrat, the local District Director, is fact-finder. The award of benefits below was developed and approved by the Seattle District Director. Employer was not entitled to litigate the elements of the plan before the OALJ. Nonetheless, the plan and its details were the decisive factor determining the extent of the employer's financial liability.

OWCP vocational rehabilitation is intended to return injured workers to the workforce. As currently applied, the program creates clear disincentive to return to suitable

employment following a work injury. By divorcing the award of benefits from the statutory definition of "disability," an injured worker's actual loss of wage earning capacity, the Director rewards those workers who voluntarily remove themselves from the labor force and penalizes those workers motivated enough to seek remunerative post-injury employment. Based on the information received by TLI and from review of reported cases, in several instances workers are directed to programs that are unrealistic or undertaken with minimal effort, which is consistent with a desire to extend benefits beyond the statutory entitlement.

This problem will not soon abate. With the increasing number of U.S. workers employed abroad to perform U.S. government defense contracts in Iraq and Afghanistan the problems in *Castro* will only be repeated.⁹ As more workers are brought within the jurisdiction of the LHWCA by virtue of the Defense Base Act, 42 U.S.C. §§ 1651-5, the number of injured workers entering OWCP vocational rehabilitation and receiving extra-statutory disability benefits will only rise. The Article I agencies and judges charged with administering this Act have already set up special procedures to handle the huge influx of claims from Iraq. This Court should exercise its discretion and take this opportunity to correct the problems inherent in the current OWCP vocational rehabilitation regime.

⁹ Leigh Strobe, *War Creates Insurance Claims*, HOUSTON CHRONICLE, June 17, 2004, online version at

www.chron.com/dispatch/story.mpl/special/iraq/2632071.html

¹² See e.g. *Oberts v. McDonnell Douglas Services/Boeing*, 39 BRBS 117, 135 (ALJ)(2005); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003); *Castro v. General Contr. Co.*, 37 BRBS 65 (2003); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286 (4th Cir. 2004); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Edmonds v. Al Salaam Aircraft Co.*, 35 BRBS 168, 174 (ALJ)(2001); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998); *Boucher v. Richmond Dry Dock Co.*, 29 BRBS 713, 716 (ALJ)(1995)

The structure of the program approved below allows the District Director to act and award without any effective judicial or legislative oversight. Under the current scheme, a LHWCA employer cannot meaningfully protect its interests. This Court should grant review to restore the LHWCA benefits award scheme that was enacted by Congress.

ARGUMENT

1. The OWCP has created an extra-statutory award of benefits that conflicts with the Congressional definition of "disability" found in the LHWCA

The award at issue is extra-statutory. The court below affirmed an award of total disability compensation to a worker who did not meet the criteria for "disability" as that term is defined by Congress in the LHWCA. 33 U.S.C. § 902(10). Robert Castro injured his right knee while engaged in the course and scope of employment covered by the LHWCA. Normally, after reaching maximum healing, Castro would be entitled an award of compensation of a defined number of weeks based on the amount of impairment to his leg as discussed below. 33 U.S.C. § 908(c)(2). Instead, he was placed into a full-time OWCP-approved vocational rehabilitation program to train to be an entry-level hotel clerk. At a formal hearing before the OALJ, Castro's employer, General Construction Company, established that Castro had a wage-earning capacity and was not totally "disabled" within the meaning of the LHWCA. Despite finding that Castro had a wage-earning capacity, the ALJ nevertheless awarded Castro benefits for total disability on the ground that Castro was precluded from working because he was enrolled in a vocational rehabilitation program.

The text of the LHWCA does not provide for the payment of disability compensation benefits to workers on the basis of enrollment in vocational rehabilitation. The court

below admitted this. *General Construction Co. v. Castro*, 401 F.3d 963, 971 (9th Cir. 2005). Such awards are in direct opposition to the criteria established by Congress as a predicate to entitlement for disability benefits. The LHWCA authorizes compensation not for physical harm, but for economic harm caused by a decreased ability to earn wages due to an injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). Congress defines "disability" in the LHWCA as "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury[.]" 33 U.S.C. § 902(10). Disability is conclusively established for certain injuries specified in the statute. 33 U.S.C. §§ 908(c)(1)-(c)(20), 908(c)(22). In all other cases, the LHWCA compensates for the loss in earning capacity occasioned by the injury. The LHWCA awards 66 2/3% of the difference between the pre-injury wages and the post-injury wage earning capacity. 33 U.S.C. §§ 908(c)(21), 908(e).

LHWCA disability is an economic concept; a product of the worker's physical capacities and the employment opportunities realistically available to him. The *Castro* decision has impermissibly introduced a new, non-statutory basis for awarding disability benefits--enrollment in a vocational rehabilitation program. The LHWCA as Congress designed it compensates only for the actual loss of wage earning capacity. When a worker with some post-injury earning capacity chooses not to work or chooses to work at less than her actual earning capacity, benefits are awarded based on the earning capacity and not the actual earnings. *Rambo II*, 521 U.S. at 127. The *Castro* court has authorized an award of total disability benefits to a worker who is *physically capable* of performing employment that is realistically available to him. Thus, a worker who ordinarily would not qualify for total disability benefits under the LHWCA is awarded the windfall of total disability benefits simply by virtue of his enrollment in a vocational

rehabilitation program. The meaning of "disability" has been changed without Congressional action.

The altered definition of "disability" advanced by the Director and adopted below upsets the benefit award process crafted by Congress. The LHWCA is a legislative compromise of the competing interests of workers and employers. The LHWCA provides injured workers with no-fault compensation while protecting employers from the increased liability associated with common-law tort suits. *PEPCO*, 449 U.S. at 281. Under the LHWCA, employers are liable to their injured employees only for the decrease in wage earning capacity resulting from the work injury. However, under this new *ultra vires* scheme created by the OWCP and approved by the court below, the employer is subject to additional liability not based on any loss in wage-earning capacity, but based solely on a worker's decision to participate in OWCP-sponsored vocational rehabilitation.

There is also no regulation supporting this award. The Secretary of Labor directs the vocational rehabilitation of permanently disabled employees. 33 U.S.C. § 939(c)(2). The Secretary has promulgated regulations outlining the LHWCA vocational rehabilitation procedures. *See* 20 C.F.R. §§ 702.501-702.508. However, the regulations contain no provisions that make an employer responsible for disability payments to workers enrolled in vocational rehabilitation programs. Since the Act has an elaborate benefit scheme crafted by Congress and is completely silent on any additional payments for vocational rehabilitation participants save a \$25 weekly payment, 20 C.F.R. § 702.507, the OWCP and the court below committed reversible error by reading such a provision into the Act. The error is compounded by the failure of the OWCP to propose such a program through the regulatory system. This Court has eschewed loose interpretation of the LHWCA in the past. *See e.g. Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952) ("We

are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability.' Congress knew the difference between 'disability' and 'injury' and used the words advisedly.").

This Court should review the decision below to restore the meaning of the LHWCA as it was enacted by Congress. The court below has allowed the OWCP to re-define "disability" under the LHWCA in a manner inconsistent with the statutory text and the implementing regulations.

2. The Director, OWCP's vocational rehabilitation procedures and the decision below impermissibly allow a District Director to make findings of disputed fact.

Under the OWCP vocational rehabilitation regime approved by the *Castro* decision, factual determinations directly affecting the extent of an employer's compensation liability are made by the District Director and her staff. This is contrary to the LHWCA and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-96. Under the LHWCA the OALJ is the only body empowered to make findings of disputed fact relating to the award of compensation benefits. *Healy Tibbits Builders, Inc. v. Cabral*, 201 F.3d 1090, 1095 n. 7 (9th Cir. 2000). All hearings conducted under the LHWCA are subject to the APA, and must be conducted by an ALJ. 33 U.S.C. § 919(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). By affirming the award of total disability benefits, the court below upheld a compensation order based, at least in part, on factual determinations made by a non-ALJ from facts collected in a manner not in accordance with the APA.

3. The problem created below – total disability awards based solely on a claimant's participation in vocational rehabilitation – will only increase

Since the Fifth Circuit issued its *Abbott* decision in 1994, it has become increasingly common for employers to be held liable for total disability benefits simply on the basis of a claimant's full-time participation in vocational rehabilitation.¹² With the increasing number of U.S. defense contractor employees working overseas, often in hostile and dangerous environments prone to injury, the industry believes that this trend is likely to continue. This, in turn, will increase the costs to LHWCA employer and insurance carriers in the form of higher premiums and higher assessments from the Special Fund. See 33 U.S.C. § 939(c)(2) (the administrative costs of the OWCP vocational rehabilitation program are paid by the LHWCA Special Fund, which is funded by assessments against LHWCA insurers). It will also increase the costs for the U.S. government, particularly the Department of Defense (DoD). Employees of DoD contractors who are injured while working overseas are covered by the LHWCA and eligible for OWCP vocational rehabilitation. Because many DoD contracts are "pass-through" contracts, the increased costs attendant to the Director's extra-statutory award of compensation will be borne by the U.S. government. Even where the contractor is not operating pursuant to a "pass-through" contract, if the employee is injured by a "war hazard," the U.S. is still responsible for the disability compensation paid under the LHWCA (including any award for total disability during vocational rehabilitation) under the War Hazards Compensation Act, 42 U.S.C. §§ 1701-6.

4. The Director, OWCP's award of vocational rehabilitation benefits violates the Congressional policy enacted in the 1972 Amendments to the LHWCA

The OWCP's vocational rehabilitation procedures are contrary to the 1972 Amendments to the LHWCA. In 1972, the Congress separated the authority to perform adjudicative and administrative functions under the LHWCA into two separate bodies, the OALJ and the OWCP. *Healy*, 201 F.3d at 1093; *see also* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. Prior to 1972, deputy commissioners (the predecessor to District Directors) performed both functions. *Healy*, 201 F.3d at 1093. Congress' explicit policy behind this separation was the "belief that the administration of the . . . Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings." *Id.* at 1094 (quoting H.R. Rep. No. 92-1441, *reprinted* in 1972 U.S.C.A.A.N. 4698).

The OWCP guidelines and the award below suffer from a similar mixing of administrative and adjudicative functions. The District Director and her staff (and counselors contracted by her) create a vocational rehabilitation plan. The District Director then *ex parte* hears and rules on objections to her plan and approves her plan without any official record being created, without witnesses being sworn, without the opportunity for the employer to cross-examine anyone about facts that underlie the award. Then, under *Castro*, the plan is used to determine the nature and extent of an employer's financial responsibility under the LHWCA.

Congress made an abrupt and clear change to the LHWCA compensation award system in 1972. *See e.g. Crowell v. Benson*, 285 U.S. 22, 42-44 (1932) (explaining pre-1972 procedures). Congress removed district directors from the claims adjudication process in 1972 and transferred the responsibility to decide disputed cases to the OALJ, putting the trial process under the aegis of the APA. 33 U.S.C. § 919(d); H.R. Rep. 92-1441. At some stage in the proceedings below, General Construction company should

have been afforded the opportunity for a hearing before the OALJ, a body independent of the District Director, on the merits of the District Director's plan. By express act of Congress, adjudicatory functions are vested in the OALJ. For this policy to have any meaning at all, an ALJ must be free to inquire into any and all factors offered as evidence of disability under the LHWCA. Review of the decision below is necessary to return the LHWCA to the clear bright line established by Congress in the 1972 Amendments and prevent the *de facto* award of compensation by District Directors.

5. The system approved below evades both effective Congressional and judicial oversight and requires this Court's action to correct the errors inherent in the current program

This Court is in the best position to correct the error below. The process created by the Director and approved by the Court below is not subject to the scrutiny of the normal adversarial litigation process or effective Congressional oversight. It is a situation ripe for abuse and has allowed the program to develop into an extra-statutory award of benefits never authorized by Congress and contrary to the intent and plain meaning of the statute.

Once a LHWCA claimant has been referred to vocational rehabilitation, a rehabilitation counselor is assigned to develop a vocational rehabilitation plan. The counselor then submits the plan to the OWCP rehabilitation specialist. At the same time, the plan is sent to the employer and insurance carrier for comment. The employer has 14 days to submit objections and comments to the District Director. This is typically not enough time for the employer to retain their own vocational expert to evaluate the proposed program, have that expert generate a report analyzing the proposed program, and for that expert to survey the relevant

labor market for suitable alternative employment. The employer's objections are first considered by the OWCP rehabilitation specialist, who is charged with providing a written response and address any deficiencies shown by "well-founded" objections.

The plan is then considered by the District Director. If the District Director overrules the objections, she must provide a written explanation. An employer may appeal the award of vocational rehabilitation by filing a notice of appeal with the Benefits Review Board within 30 days of the date the approved plan is filed or reconsideration is denied. The Board reviews the District Director's approval of a vocational rehabilitation plan using an "abuse of discretion" standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164, 167 (2003). An employer is not entitled to a hearing conducted before the OALJ in accordance with the APA on the merits, reasonableness, necessity, or propriety of the vocational rehabilitation plan. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003). The ALJ is only allowed to formally award benefits during the period of vocational rehabilitation. *Meinert*, 37 BRBS at 167.

As a practical matter the OALJ can provide no effective judicial oversight of the vocational rehabilitation award. If, as was the case below, the District Director places a claimant in a full-time vocational program, the worker will be entitled to disability benefits even if there is suitable alternative employment actually available. See *Castro*, 401 F.3d at 972. Thus, factors directly impacting a LHWCA employer's financial liability are determined in a non-judicial, purely administrative, procedure and subject only to the lightest review, abuse of discretion review.

Similarly, the program as approved below is shielded from Congressional oversight. The administrative costs of the vocational rehabilitation program are paid by the

LHWCA Special Fund. 33 U.S.C. § 939(c)(2). The Special Fund is not funded by Congress, but from moneys collected from LHWCA employers and insurance carriers. 33 U.S.C. § 944(c). Thus, unlike most government programs, this program is not dependent upon annual Congressional appropriations and the attendant oversight.

Finally, this Court is in the best position to correct the problems created by the extra-statutory award of compensation created by the Director. The immediate decision below cannot be corrected absent an *en banc* decision by the Ninth Circuit. Even this would not be enough to provide true relief to LHWCA employer and insurance carriers. The maritime industry is not a local or regional industry and, while the operations of individual employers may be limited in geographic scope, LHWCA insurers write risks on a nationwide basis and are liable for claims occurring throughout the country. An *en banc* reversal from the Ninth Circuit would only alleviate a portion of the problem. The Board, whose jurisdiction extends to all LHWCA claims, has stated that the *Abbott* opinion is to be applied to all claimants in all cases arising under the LHWCA. *Castro v General Construction Co.*, 37 BRBS 65, 69-70 (2003). True relief requires an overriding decision of nationwide application that only this Court can provide.

6. The program approved below has been consistently applied in a manner inconsistent with the applicable federal regulations

The vocational program is ostensibly subject to federal regulations promulgated by the Secretary of Labor. See 20 C.F.R. §§ 702.501-702.508. However, the reality of the program is that these regulations do not provide an effective control on the program and that the program is being administered in a manner inconsistent with the regulations.

Vocational rehabilitation is reserved for permanently disabled workers. 20 C.F.R. § 702.501. The stated goal of vocational rehabilitation is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity. 20 C.F.R. § 702.506.¹³ From the beginning, this regulatory criteria has been effectively ignored and the Benefits Review Board and the federal courts have refused to enforce the regulatory limitations. Claimants have been awarded vocational rehabilitation before their disability became permanent. See e.g. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 196 (2001). The plans approved by District Directors are not "short" and an employer's extra-statutory liability often persists for years. See e.g. *Abbott*, 40 F.3d at 124 (4 year program); *Bush v. I.T.O. Corp.*, 32 BRBS 213, 213 (1998) (3 year program).

7. The Ninth Circuit's decision creates a perverse incentive for workers to seek public resources in lieu of returning to work with the employer or in suitable alternate employment

The decision below sticks the employer with the cost of an unauthorized total disability award. But, the Director is responsible for paying for some of the vocational rehabilitation services. 33 U.S.C. § 939(c)(2). This most often includes the appointment of a Vocational Rehabilitation Counselor (VRC) by the Director. The private VRC is paid an hourly rate, often in excess of \$70 per hour, by the federal government to work with the injured worker to develop a vocational plan, discuss options for retraining, or attempt to

¹³ The full regulation reads: "Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially." 20 C.F.R. § 702.506.

return to other employment. The Director may also pay for any equipment reasonably necessary for the injured workers' retraining program, e.g., books or a computer, while the employer is expected to pay total disability benefits with only a modicum of input. 33 U.S.C. § 939(c)(2). These expenditures may go unnoticed by Congress because they are paid from an assessment against LHWCA employers and insurance carriers. 33 U.S.C. § 944(i)(2).

The program approved below is directly counter to the goals of vocational rehabilitation and the LHWCA. By creating an award of benefits without regard to any actual loss of wage earning capacity, it creates the incentive to refuse to return to the work force. Therefore, any injured worker who wishes to extend his benefits beyond his normal entitlement can be considered for a vocational rehabilitation program, even where there is suitable employment actually available for them. Conversely, those workers who do take the initiative to return to work are punished because they lose benefits otherwise available to them. See e.g. *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (worker who obtained part-time employment on her own was denied benefits during vocational rehabilitation because of her employment).

Vocational rehabilitation is designed to return employees to work at restored or increased wage earning capacity. 20 C.F.R. § 702.506. However, the extra-statutory award creates an incentive for injured workers to ignore higher paying jobs actually available to them post-injury in favor of vocational retraining to obtain entry level work in a new field. See *Bush*, 32 BRBS at 213. In *Bush*, the claimant had a college degree prior to his injury, and his employer established that claimant had the capacity post-injury to earn greater than the minimum wage without retraining. *Id.* at 214-5. Nevertheless, the Board upheld the award of total disability benefits during three years of retraining for an entry

level nursing position. *Id.* at 218. It is only the availability of disability benefits, regardless of earning capacity, during enrollment that twists the LHWCA away from its remedial purposes.

Any retraining program will likely deprive the worker of the option to return to work, and the worker will be paid total disability benefits while he goes to school under the Ninth Circuit's opinion. The employer is not given a reasonable opportunity to conduct discovery or cross-examine witnesses in the vocational plan approval process; therefore, there exists an opportunity for injured workers or their counsel to use the vocational program to bootstrap an entitlement to total disability without the scrutiny of a formal hearing on disputed issues of fact.

Castro, a carpenter and pile driver, was enrolled in lengthy re-education and training program in hotel management to start as an entry-level motel clerk earning \$16,000 per year, and sometime in the future possibly be elevated to hotel management. *Castro*, 401 F.3d at 966. In a similar case, David Clark, a diesel mechanic, was also awarded a vocational plan by the same Director, including two years of remedial education at a community college and technical school training. Mr. Clark eventually quit the vocational program after several weeks of total LHWCA disability benefits not because it was too difficult or because he found a job, but because he was awarded Social Security Disability benefits. *Clark v. Chugach Development Corp.*, BRB No. 04-0890, Slip. Op. at 4 (August 18, 2005) (unpublished). In *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286 (4th Cir. 2002), the worker was offered a job senior engineering analyst that paid more than the job in Graphics Communications that he was training for, but he turned it down out of job security concerns. *Brickhouse*, 315 F.3d at 290.

Therefore, without the scrutiny of the time-tested adversarial process or Congressional oversight, injured workers or their counsel have the liberty to pursue extra-statutory disability benefits on the employer's and the federal government's dime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. FITZHUGH III

Counsel of Record

MATTHEW H. AMMERMAN

NICHOLAS W. EARLES

FITZHUGH, ELLIOTT & AMMERMAN

12727 Kimberley Lane, Ste. 302

Houston, TX 77024-4050

(713) 465-7395

**In The
Supreme Court of the United States**

**GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,**

Petitioners,

v.

**ROBERT CASTRO and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,**

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR CERTIORARI**

RICHARD A. HODYL, JR.

Counsel of Record

MECKLER, BULGER & TILSON

123 North Wacker Drive,

Suite 1800

Chicago, Illinois 60606

(312) 474-7968

ROBERT HURNS

Director and Counsel

PROPERTY CASUALTY INSURERS

ASSOCIATION OF AMERICA

2600 River Road

Des Plaines, Illinois 60018

(847) 297-7800

**MOTION FOR LEAVE TO FILE BRIEF OF
PROPERTY CASUALTY INSURERS ASSOCIATION
OF AMERICA AS *AMICUS CURIAE* IN SUPPORT
OF THE PETITION FOR CERTIORARI**

The Property Casualty Insurers Association of America ("PCI") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari filed in this case. Written consent has been filed with the Court by Petitioners and for Respondent Castro. Because no consent was filed independently by the Solicitor General, this motion is filed in the event that the Respondent's filed consent does not include consent by the Solicitor General as well.

The PCI is a trade group representing more than 1,000 property and casualty insurance companies and is the leading voice of the insurance industry. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for \$184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry.

Numerous PCI member insurance companies have a direct interest in the proper administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act¹ (hereinafter the "LHWCA" or the "Act"). The outcome of this case will have a significant financial impact on those PCI member insurers and policyholders as well. Because of the potential financial impact this case may have on the insurance industry, PCI and its member insurers have an interest in the determination of the rights and liabilities of employers and employees concerning vocational rehabilitation.

The specific issue presented in this case is whether a claimant is entitled to total disability payments even in circumstances where the claimant is participating in vocational rehabilitation. PCI and its members assert that the LHWCA does not provide for benefits under such circumstances. PCI and its members assert that if the LHWCA is construed to afford benefits to a claimant where the claimant is participating in vocational rehabilitation, that construction will create a disincentive for claimants to promptly return to work, a result that will be directly in conflict with the goal of the Act.

PCI respectfully requests this Court should grant this motion and permit PCI to file its brief *amicus curiae*, and

¹ 33 U.S.C. § 901, *et seq.*

that this Court should grant the petition and overrule the decision by the appellate court below.

Respectfully submitted,

RICHARD A. HODYL, JR.

Counsel of Record

MECKLER, BULGER & TILSON

123 North Wacker Drive,

Suite 1800

Chicago, Illinois 60606

(312) 474-7968

ROBERT HURNS

Director and Counsel

PROPERTY CASUALTY INSURERS

ASSOCIATION OF AMERICA

2600 River Road

Des Plaines, Illinois 60018

(847) 297-7800

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ERRONE- OUSLY HELD THE LHWCA PERMITS TEMPORARY TOTAL DISABILITY BENE- FITS ARE TO BE PAID WHILE A CLAIMANT UNDERGOES VOCATIONAL REHABILITA- TION	3
II. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES RAISED BY THIS APPEAL WILL HAVE A WIDESPREAD IMPACT ON BUSINESS AND INDUSTRY	6
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
STATUTES:	
33 U.S.C. § 901	1
33 U.S.C. § 908(a).....	4, 5
33 U.S.C. § 908(b).....	4, 5
33 U.S.C. § 908(e).....	5

**BRIEF OF THE PROPERTY CASUALTY
INSURERS ASSOCIATION OF AMERICA
AS *AMICUS CURIAE* IN SUPPORT OF THE
PETITION FOR CERTIORARI
INTEREST OF THE *AMICUS CURIAE*¹**

The PCI is a trade group representing more than 1,000 property and casualty insurance companies and is the leading voice of the insurance industry. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for \$184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry.

Numerous PCI member insurance companies have a direct interest in the proper administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act² (hereinafter the "LHWCA" or the "Act"). The outcome of this case will have a significant financial impact on those PCI member insurers and

¹ No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to this brief's preparation and submission.

² 33 U.S.C. § 901, *et seq.*

policyholders as well. Because of the potential financial impact this case may have on the insurance industry, PCI and its member insurers have an interest in the determination of the rights and liabilities of employers and employees concerning vocational rehabilitation.

The specific issue presented in this case is whether a claimant is entitled to total disability payments even in circumstances where the claimant is participating in vocational rehabilitation. PCI and its members assert that the LHWCA does not provide for benefits under such circumstances. PCI and its members assert that if the LHWCA is construed to afford benefits to a claimant where the claimant is participating in vocational rehabilitation, that construction will create a disincentive for claimants to promptly return to work, a result that will be directly in conflict with the goal of the Act.

SUMMARY OF ARGUMENT

The *amicus curiae* submits in this brief that the Act does not support the payment of temporary total disability during vocational rehabilitation. On that basis, the Ninth Circuit committed reversible error and this court should reverse the decision below and should rule in favor of Petitioners.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ERRONEOUSLY HELD THE LHWCA PERMITS TEMPORARY TOTAL DISABILITY BENEFITS ARE TO BE PAID WHILE A CLAIMANT UNDERGOES VOCATIONAL REHABILITATION.

The Ninth Circuit committed reversible error when it held that participation in vocational rehabilitation renders a claimant totally disabled. The Ninth Circuit's decision is not supported by the language of the Act. The conclusion reached by the Ninth Circuit, if left intact, will improperly expand the total disability provision of the LHWCA far beyond what Congress intended. The Ninth Circuit's erroneous expansion of the LHWCA should be flatly rejected by this Court and should be reversed.

The LHWCA sets forth four classifications of disability: Each of these four classifications of liability are discussed below. None of these classifications of liability include any provision that provides a claimant is to be deemed as being totally disabled while undergoing vocational rehabilitation.

The LHWCA defines "disability" in the following manner:

"[I]ncapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Total disability may occur as a result of either a scheduled or unscheduled injury where claimant retains no wage-earning capacity. A "disability" under the LHWCA constitutes a "total" disability when the claimant is unable

to perform any suitable alternative employment or where suitable alternative employment is not available.

The first classification of disability in the LHWCA is "permanent total". 33 U.S.C. § 908(a) states:

Compensation for disability shall be paid to the employee as follows: (a) Permanent total disability: In case of total disability adjudged to be permanent 66 $\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

A "permanent total" disability under 33 U.S.C. § 908(a) is clearly limited to circumstances where the claimant has lost his or her hands, feet, legs or eyes. 33 U.S.C. § 908(a) also provides there are other circumstances where a permanent total disability may be found, and those injuries should be evaluated on a case by case basis. However, 33 U.S.C. § 908(a) does not provide that a "permanent total" disability may exist where the injured claimant is undergoing vocational rehabilitation.

The second classification of disability in the LHWCA is "temporary total" disability. 33 U.S.C. § 908(b) states:

Temporary total disability: In case of disability total in character but temporary in quality 66 $\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

No provision is made in 33 U.S.C. § 908(b) that a claimant is deemed to be disabled while undergoing vocational rehabilitation.

The third classification of disability in the LHWCA is "temporary partial" disability. 33 U.S.C. § 908(e) states:

Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 908(e)

The fourth and final classification of disability under the LHWCA is "permanent partial" disability. According to the LHWCA, "permanent partial" disabilities can be classified in one of two ways – scheduled or unscheduled disability. A scheduled injury is defined in § 8(c)(2) of the LHWCA. Scheduled permanent partial disability benefits are to be paid according to specific provisions contained in the schedule. Where a specific type of injury does not fall within the scheduled injury provisions of § 8(c)(2), the injury is referred to as an "unscheduled" permanent partial disability. The importance of this classification is that benefits paid for an unscheduled permanent partial disability are calculated using the injured employee's wage-earning capacity.

None of the foregoing disability classifications supports the decision by the Ninth Circuit. The Ninth Circuit failed to properly apply the concept of what the term

"disability" means within the context and plain language of the LHWCA. Rather than strictly applying and enforcing the clear and unambiguous disability provisions of the LHWCA, the Ninth Circuit instead basically redefined the definition of "disability" in the LHWCA to include an injured claimant's participation in vocational rehabilitation. The Ninth Circuit's decision changes the focus from the type of injury and the severity of the injury to whether the injured party is participating in vocational rehabilitation. This is not what LHWCA provides and clearly by the language of the LHWCA was not Congress' intent. The Ninth Circuit's expansive reading and application of the LHWCA should be flatly rejected in this case, and Petitioner's petition should be granted to afford Petitioners and their *amici* the opportunity to more fully explain why the Ninth Circuit's decision was erroneous and why it constitutes reversible error.

For these reasons, and for those not set forth herein but which are stated in the Petition for Writ of Certiorari, the Petition should be granted.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES RAISED BY THIS APPEAL WILL HAVE A WIDESPREAD IMPACT ON BUSINESS AND INDUSTRY

The decision by the Ninth Circuit will not be limited to the litigants in this appeal. The issue presented by the Petition for Writ of Certiorari is of wide-reaching importance to other industries. The insurance industry is particularly interested in this issue, because the Ninth Circuit's decision threatens to create inconsistent interpretations of the LHWCA. The Petition accurately described the inconsistencies between the Ninth Circuit's opinion

and other courts. This brief will not revisit those specific distinctions and inconsistencies, as they have been comprehensively addressed by Petitioners. To the extent necessary, Petitioner's argument that there are inconsistencies between the Ninth Circuit's opinion and other courts, those arguments are to be deemed as thoughtfully adopted as though set forth herein.

To have inconsistent interpretations and applications of the LHWCA may present significant problems in the administration of claims and payments of benefits under relevant insurance policies. The Ninth Circuit's decision results in different insurable losses depending upon the region in the country where a particular disability claim is made. If the Ninth Circuit's decision is left intact, the concept of uniformity in the law will be subverted.

The lack of uniformity in the law can impact insurers and their policyholders in numerous ways. First, inconsistent court decisions involving the LHWCA will cause insurers to experience greater difficulty in achieving consistency in claims handling. Second, insurers will likely have greater difficulty in setting claims reserves because of the uncertainty and inconsistency in the application of the LHWCA.

Any inconsistency in the law in this area can present a significant challenge to insurers. To protect their policyholders and to ensure that they have sufficient reserves to pay potential claims, insurers must be able to accurately assess the true potential risk they may face if claims are made against their policies. This process also leads to the determination of premiums that will be charged to policyholders for coverage.

The Ninth Circuit's erroneous decision can result in varying applications of the LHWCA disability provisions from one jurisdiction to the next, the result of which would be that the level of disability payments required under the LHWCA would vary between jurisdictions. Such a volatile and inconsistent environment in the courts would leave insurers with uncertainty in their setting of loss reserves. The result of this uncertainty may be that insurers would be have to charge higher premiums to policyholders in order to have sufficient funds in loss reserves.

In addition to the reasons set forth in the Petition, each of which PCI and its member companies respectfully submit are independent grounds for granting the Petition, the Petition should also be granted to afford the PCI and other *amici curiae* the opportunity to provide this Court with a more detailed explanation of how far-reaching the implications of the Ninth Circuit's decision will likely be. The decision below may impact countless other industries, such as insurers, their employees and policyholders, and the extent to which these industries may be impacted was not addressed in the Ninth Circuit's decision. The PCI respectfully submits that this Court has the opportunity to prevent unintended negative consequences the Ninth Circuit's erroneous decision may have on others in addition to the Petitioners by granting the Petition. Accordingly, PCI respectfully submits that the Petition should be granted.

CONCLUSION

The Ninth Circuit's erroneous application and interpretation of the LHWCA warrants this Court's immediate review. The Ninth Circuit's decision below is not supported by the plain language of the Act nor by Congress' intent.

For the reasons set forth above, the Court should grant General Construction Company and Liberty Northwest Insurance Corp.'s Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD A. HODYL, JR.

Counsel of Record

MECKLER, BULGER & TILSON

123 North Wacker Drive,

Suite 1800

Chicago, Illinois 60606

(312) 474-7968

ROBERT HURNS

Director and Counsel

PROPERTY CASUALTY INSURERS

ASSOCIATION OF AMERICA

2600 River Road

Des Plaines, Illinois 60018

(847) 297-7800

DEC 19 2005

OFFICE OF THE CLERK

No. 05-371

**In The
Supreme Court of the United States**

**GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,**

Petitioners,

v.

**ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,**

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF

**MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350**

**RAYMOND H. WARNS, JR.
Counsel of Record
ROBERT J. BURKE, JR.
HOLMES WEDDLE & BARCOTT
999 Third Ave., Suite 2600
Seattle, WA 98104
(206) 292-8008**

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
REPLY BRIEF	1
I. This Court should review the Ninth Circuit's "bright-line 75% rule" requiring the applica- tion of LHWCA § 10(a) in cases in which LHWCA § 10(c) should apply.....	1
II. This Court should review the Ninth Circuit's rule awarding total disability benefits during a period of vocational retraining when the in- jured employee would otherwise be limited to recovery under the Act's schedule.....	5
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brickhouse v. Jonathan Corp.</i> , 525 U.S. 1040 (1998)	8
<i>Duhagon v. Metropolitan Stevedore Co.</i> , 169 F.3d 615 (CA9 1999) (per curiam)	4, 5
<i>Duhagon v. Metropolitan Stevedore Co.</i> , 31 B.R.B.S. 98 (1997)	5
<i>Fred Settoon, Inc. v. Gros</i> , 125 S. Ct. 408 (2004)	8
<i>Gulf Best Electric, Inc. v. Methe</i> , 396 F.3d 601 (CA5 2004)	3, 4
<i>Louisiana Insurance Guaranty Association v. Abbott</i> , 40 F.3d 122 (CA5 1994)	7
<i>Matulic v. Director, OWCP</i> , 154 F.3d 1052 (CA9 1998)	2, 3, 4
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	5, 6, 9
<i>Stevedoring Services of America v. Price</i> , 382 F.3d 878 (CA9 2004)	3
<i>Strand v. Hansen Seaway Service</i> , 614 F.2d 572 (CA7 1980)	3, 4
STATUTORY AND LEGISLATIVE MATERIAL	
Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50	1, 8
LHWCA § 8(c)(1)-(20), 33 U.S.C. § 908(c)(1)-(20)	6
LHWCA § 10(a), 33 U.S.C. § 910(a)	1, 2, 3, 4
LHWCA § 10(c), 33 U.S.C. § 910(c)	1, 2, 3, 4

TABLE OF AUTHORITIES - Continued

	Page
Defense Base Act, 42 U.S.C. §§ 1651-55	8
S. REP. NO. 1315, 80th Cong., 2d Sess. (1948)	4

REPLY BRIEF

The Ninth Circuit in this case decided two critical issues of federal statutory interpretation under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50. Respondents seek to deny the extent to which these rulings conflict with the decisions of this Court and other courts of appeals and to minimize the importance of the questions presented, but they can do this only by mischaracterizing the issues before the Court and ignoring the real-world impact of the decision. As the extensive *amicus* participation helps demonstrate, the case raises important issues that this Court should decide.

I. This Court should review the Ninth Circuit's "bright-line 75% rule" requiring the application of LHWCA § 10(a) in cases in which LHWCA § 10(c) should properly apply

Section 10(a) of the LHWCA, 33 U.S.C. § 910(a) (Pet. App. 96), applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury." Respondent Castro correctly notes that "virtually no one actually works 52 full weeks in a year." Castro Br. 14. Thus petitioners could not object if an administrative law judge (ALJ) applied section 10(a), for example, when a claimant worked every day except for paid vacation time and public holidays. But it is also true that virtually no one gets 13 full weeks per year of vacation and holiday time, which is what the Ninth Circuit's "bright-line 75% rule" fails to recognize.

Section 10(a) "can not reasonably and fairly be applied," LHWCA § 10(c), 33 U.S.C. § 910(c) (Pet. App. 96), to a worker who chooses to work only four days per week in

order to enjoy three-day weekends, or to a worker who chooses to take an extra two months of vacation each summer, or to a worker who chooses "to stay off work in order to pursue the permitting process for installation of a bulkhead at his home," *Castro Br. 7*. In each of these cases, the worker has made a choice to work fewer hours and receive less pay because he prefers to pursue other activities. That is the worker's choice. But it is unreasonable and unfair for the worker then to demand compensation on the assumption that his injury deprives him of the wages of a full-time worker who made very different choices. The Ninth Circuit's bright-line 75% rule, however, requires this unreasonable and unfair result. Under *Matulic v. Director, OWCP*, 154 F.3d 1052, 1058-59 (CA9 1998), an ALJ may not rely on section 10(c) based solely on the number of days worked (so long as the claimant worked at least 75% of the available days). In short, the worker's choice to work fewer days – which is precisely what makes the application of section 10(a) unreasonable and unfair – is the one factor that the ALJ may not consider.

Petitioners in this case challenge the legal rule by which the Ninth Circuit denies ALJs the power to apply the LHWCA as Congress enacted it and instead requires them to apply a bright-line 75% rule ignoring the single most relevant fact in many cases. Of course an ALJ would decide, on the facts of a particular case, that a particular claimant worked "during substantially the whole of the year immediately preceding his injury" despite taking vacations and holidays. An ALJ could even decide, on the facts of a particular case, that a particular claimant's "average annual earnings" under section 10(c) are substantially the same as they would have been under section

10(a). Results in particular cases are not the point here. The point is to recognize how the decision must be made. Congress gave the power to ALJs, who hear the evidence and can see what is unreasonable and unfair in a particular case, not to Judge Reinhardt, who invented the Ninth Circuit's bright-line 75% rule in *Matulic*.¹

Respondents seek to distract this Court from the true question presented. Indeed the Director of the Office of Workers' Compensation Programs ("OWCP") tries to rephrase the question to focus on whether section 10(a) can be applied without "practical difficulty," OWCP Br. i, when Congress explicitly declared the standard to be whether section 10(a) can be applied "reasonably and fairly," LHWCA § 10(c). But when the focus is on the proper question, it can be seen that the Ninth Circuit was correct to acknowledge (in two separate cases) that its bright-line 75% rule conflicts with *Strand v. Hansen Seaway Service*, 614 F.2d 572 (CA7 1980), see Pet. 11-12, and that the *Matulic* rule is inconsistent with the approach taken in the Fourth and Fifth² Circuits, *id.* at 12.

¹ Castro makes an ingenious policy argument to support the view that determinations are better made under section 10(a) than section 10(c). Castro Br. 14-16. Such arguments are better addressed to Congress, which has the power to change the criteria for selecting among section 10's three options. In any event, the evidence does not support Castro's argument that relying on section 10(a) would reduce litigation. In the Ninth Circuit, which forces claimants into section 10(a), cases addressing this issue keep rising to the appellate level. (In addition to *Matulic* and the decision below, see *Stevedoring Services of America v. Price*, 382 F.3d 878 (CA9 2004).) But the Seventh Circuit, which has rejected the Ninth Circuit's approach, does not appear to have had any reported cases in the last quarter-century.

² The Director's statement, OWCP Br. 11, that "the Fifth Circuit expressly relied on" *Matulic* is misleading. *Gulf Best Electric, Inc. v.*
(Continued on following page)

Castro suggests that *Strand* can be distinguished because the Seventh Circuit was simply relying on the 1948 legislative history that "explicitly showed that § 10(c) . . . was intended to be applied to 'seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek.'" Castro Br. 18 (quoting S. REP. NO. 1315, 80th Cong., 2d Sess. 6 (1948)). But there is no legitimate distinction. Castro admits that his employment was discontinuous because he took off seven weeks between jobs to attend to personal business. Castro Br. 7. The passage on which the *Strand* court relied would therefore compel reversal here. The Director's efforts to distinguish *Strand* based on the seasonal nature of the employment, OWCP Br. 10-11, fail for the same reason. There is no rational distinction between "seasonal" employment and any other "intermittent" or "discontinuous" employment.

Castro is also wrong to suggest that this case provides a poor vehicle to resolve the problems caused by the Ninth Circuit's *Matulic* rule. Cf. Castro Br. 20-21. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (CA9 1999) (per curiam), does not create the general rule that Castro ascribes to it. The *Duhagon* court's reference to the failure to "show the number of days worked per week" was instead a criticism of the claimant's "failure to offer any

Methe, 396 F.3d 601, 606 n.1 (CA5 2004), cites *Matulic* for the proposition that some over-compensation is built into the system. But this was in the context of missing work for reasons that are consistent with full-time employment, e.g., "illness, vacation, strikes." *Id.* The Fifth Circuit did not suggest that section 10(a) should apply when a worker makes a deliberate choice to work fewer days. More significantly, the Fifth Circuit explicitly declined to adopt the "bright-line test" that is at issue here. See *id.* at 606.

evidence whatsoever regarding whether he was a five day or six day worker," *Duhagon* Respondent's CA9 Br. 29. This is clear both from the briefing in the Ninth Circuit, see, e.g., *id.* at 20, 23, 29, and from the Benefits Review Board opinion that the *Duhagon* court was reviewing, see *Duhagon v. Metropolitan Stevedore Co.*, 31 B.R.B.S. 98, 101 (1997) ("claimant could not establish that he was either a five- or six-day per week worker"). Here there is no dispute that Castro was a five-day worker. Moreover, his sworn declaration in the record indicates the total number of days that he worked, see Pet. App. 76-77, thus solving any problem that might have arisen if his reading of *Duhagon* had been correct.

By rejecting the Congressional scheme that gives ALJs the flexibility to decide each case on its own merits and imposing a bright-line rule when no such rule is authorized, the Ninth Circuit has substituted its judgment for Congress's. Other courts of appeals have rejected this approach. This Court should review the issue and reverse the decision below.

II. This Court should review the Ninth Circuit's rule awarding total disability benefits during a period of vocational retraining when the injured employee would otherwise be limited to recovery under the Act's schedule

The petition summarizes why the decision below conflicts with the statutory language and with *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980). The four *amicus* briefs filed in support of the petition also discuss this conflict in varying detail. The Longshore Claims Association (LCA), for example, explains

how Congress considered and rejected the legal rule that the Ninth Circuit now enforces. See LCA Br. 14-18.

Not surprisingly, both respondents defend the Ninth Circuit's rule. For Castro, this position simply reflects the desire to preserve his victory. For the Director, this position must be viewed in the larger context. In *PEPCO*, the OWCP argued strenuously that the statutory schedule in LHWCA § 8(c)(1)-(20), 33 U.S.C. § 908(c)(1)-(20), does not limit an injured worker's recovery. This Court rejected that view by an 8-1 vote. Undeterred, the OWCP now seeks to limit the *PEPCO* decision with which it disagrees. Despite clear indications of Congress's contrary intent, the Director endorses the Ninth Circuit's effort to evade *PEPCO* through a conclusory characterization of the facts that contradicts reality.

In any event, most of respondents' arguments on this issue simply preview their positions on the merits. If this Court grants certiorari, they will have ample opportunity to argue that the definition of "total disability" should be expanded beyond its ordinary meaning to include those who are instead partially disabled³ but who chose to participate in vocational retraining programs. Because this interpretation would undermine *PEPCO* whenever a scheduled injury is involved, this Court should be the one to resolve the matter.

³ Under the Director's theory, there appears to be no need for even a partial disability. If a worker is injured but suffers no loss of wage-earning capacity, the OWCP could nevertheless conclude that a vocational retraining program was appropriate. Under the Director's theory, the worker would then be totally disabled because the vocational retraining program, which was caused by the injury, would make it difficult for the claimant to continue working.

Castro also argues that the vocational retraining issue is not important enough to warrant this Court's attention, hinting that the OWCP does not approve many vocational retraining programs. See Castro Br. 23. Although published figures do not seem to be available, an inquiry to the Department of Labor revealed that the Department has sponsored approximately 4200 vocational rehabilitation cases since the decision in *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (CA5 1994), eleven years ago. On the conservative assumptions that an average program lasts ten months and that a typical claimant receives compensation at the rate of \$675 per week, this represents a burden on employers and their insurers in excess of \$122 million. The widespread view in the industry is that these numbers are likely to increase in the near future, particularly if this Court does not correct the Ninth Circuit's erroneous interpretation of the LHWCA. See, e.g., AIG Br. 6-7.

Even stronger evidence of the importance of this case is provided by the four *amicus* briefs supporting the petition. By their very nature, few LHWCA cases can financially justify a petition for certiorari to this Court unless they involve important and recurring issues. The amount at stake in most workers' compensation cases is relatively small compared to the costs associated with a petition and a subsequent merits argument, so there would be no point in filing a petition unless a significant number of future cases would be affected. Here it is not only petitioners that recognize the impact that this Court's decision would have on future cases: Representatives of other significant industry participants that would be directly affected by a decision on the merits have invested the resources to file four *amicus* briefs in support of the

petition.⁴ As these *amici* have no financial interest in the present case, their decisions clearly signal the importance of these questions.

It is noteworthy that this case is important not only for the maritime industry. While the Longshore Claims Association (LCA) primarily represents the maritime industry, see LCA Br. 1-2, and the interests of the Longshore Institute, Inc., include the maritime industry, the other *amici* are concerned about this case because of the impact that it will have in other fields. Congress has chosen to extend the LHWCA to provide a workers' compensation regime in several other contexts. See, e.g., Longshore Inst. Br. 1 & nn.2-5; Castro Br. 1 n.2. Thus the American International Group, Inc. (AIG) and CNA support the petition because the issues are important in the context of the Defense Base Act, 42 U.S.C. §§ 1651-55. Civilian employees (regardless of their nationality) who work overseas for a private employer under a contract with the United States government – including, for example, those now working in Iraq and Afghanistan – will be directly affected by this decision. See AIG Br. 1-3.

The Ninth Circuit has ignored the clear intent of Congress to reach a result motivated by sympathy rather than a proper application of the LHWCA. Its decision is

⁴ Castro hints that certiorari should instead have been granted in two other cases that, in his view, raised more important issues. See Castro Br. 25-26. The industry's own views of what is important to it, however, differ from Castro's. In *Fred Settoon, Inc. v. Gros*, 125 S. Ct. 408 (2004) (No. 03-1699), and *Brickhouse v. Jonathan Corp.*, 525 U.S. 1040 (1998) (No. 98-241), the two cases that Castro cites, it appears that *no amicus* briefs were filed in support of the petitions. The presence of four *amicus* briefs here is a strong signal that this case is important to the industry.

important not only to the maritime industry but in broader contexts as well. This Court should grant review to enforce *PEPCO*, restore the statutory meaning that Congress intended, and protect the legitimate interests of both workers and employers.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RAYMOND H. WARNS, JR.

Counsel of Record

ROBERT J. BURKE, JR.

HOLMES WEDDLE & BARCOTT

999 Third Ave., Suite 2600

Seattle, WA 98104

(206) 292-8008

MICHAEL F. STURLEY

727 East Dean Keeton St.

Austin, TX 78705

(512) 232-1350